

Much to Be Done: Towards an Effective Transitional Justice Model for Dealing with Conflict-Related Crimes of Sexual and Gender-Based Violence

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I hereby declare that I have read and understood the regulations governing the submission of **LLM Minor** dissertations, including those relating to length and plagiarism, as contained in the rules of this University, and that this dissertation conforms to those regulations.

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Table of Contents

I. Introduction: Transitional Justice and Sexual and Gender-Based Violence in the Context of Conflict.....	3
II. Sexual and Gender-based Violence: Developments in International Law.....	12
III. Transitional Justice Models: Theories and Mechanisms.....	29
IV. Challenges, Limitations, and Barriers to Justice: The Rwandan Experience.....	45
V. Conclusion: Towards a Comprehensive Model of Transitional Justice	69
Bibliography.....	80

I Introduction: Sexual and Gender-Based Violence in the Context of Conflict

Certainly, advances have been made in recognizing women's rights. The legal framework is increasingly responsive to the experiences of women and girls in conflict, especially in cases of sexual violence, as we have seen in the important work being carried out by the international criminal tribunals. But there remains much to be done, particularly to improve prevention and to combat impunity.

Kofi Annan
October 28, 2002

I.1 Introduction

Many countries in Africa have experienced conflicts characterized by gross human rights violations, including widespread and systematic sexual and gender-based violence. Several of these are currently grappling with the difficult issue of addressing the wrongs of the past while at the same time trying to secure a stable and democratic future. This study considers what an appropriate model of transitional justice should be in the African context, particularly as pertains to crimes of sexual and gender-based violence. This chapter will briefly illustrate the prevalence of sexual and gender-based violence in conflict situations, particularly in Rwanda, note the legal developments made thus far, and establish the aim of this particular study.

I.2 Background and Problem Statement

The systematic and widespread nature of sexual violence in conflict situations is not a recent phenomenon by any means. In the 1970s, Bangladeshi women suffered sexual abuse at the hands of Pakistani soldiers; Turkish soldiers subjected women in Cyprus to sexual abuse during the latter's occupation; Vietnamese women were preyed upon sexually in the 1960s and 1970s by American soldiers; and in the 1980s and 1990s,

Security Forces in Peru raped civilian women whilst in pursuit of guerrillas.¹ Rape and other acts of sexual violence have been used throughout history as weapons of war, not only as attacks on individual victims, but also as a means to ‘humiliate, shame, degrade and terrify the entire ... group.’² In her exploration of legal protection against sexual violence in armed conflicts, Lyth notes that there are several reasons why women are targeted and several ways in which sexual violence is perpetrated:

Rape can be used in order to terrorize the civilian population and to induce civilians to flee their homes and villages. It can be a means to humiliate the rival army by showing control over ‘their’ women. It can be used as a ‘perk’ for soldiers and as an inducement to courage on the battlefield. Forced prostitution can be used as a morale booster for the soldiers and as a way to make the women feel responsible for their own violation. Forced impregnation and forced pregnancy can be used to deepen the humiliation and to produce babies of the ethnicity of the rapists.³

The use of sexual violence during conflict, therefore, takes numerous forms and is inflicted upon women for varying reasons. In this sense, sexual violence is a crucial psychological and physical tool of armed conflict harnessed not only to inflict torturous physical harm, but also to break the spirits of the victims, and subsequently destroy the fabric of the society in general.

The gross violations of human rights that characterized the campaigns of ethnic cleansing and genocide in the former Yugoslavia and Rwanda brought the use of sexual violence as a weapon of war to the forefront. When the Rwanda genocide occurred in 1994, initially no accounts were reported of the brutal rapes and acts of sexual torture that were key tools of the genocide.⁴ According to research that was carried out in the aftermath of the genocide, however, it was discovered that sexual violence was not only brutal, but also

¹ Annette Lyth, ‘The development of legal protection against sexual violence in armed conflicts—advantages and disadvantages’ (2001) at 13. Available at <http://www.iktk.se/publikationer/rapporteur/pdf/development.pdf> [Accessed 6 September 2006].

² Tadeusz Mazowiecki, Special Rapporteur, *Report on the Situation of Human Rights in the Territory of the Former Yugoslavia* (1993) cited in Theodore Meron ‘Rape as a crime under international humanitarian law’ *American Journal of International Law* (1993) 87: 424 at 425.

³ Lyth *Supra* note 1 at 2.

⁴ Human Rights Watch *Shattered Lives: Sexual Violence during the Rwandan Genocide and its Aftermath* (1996).

widespread and systematic. The gruesome and horrifying testimonies collected by survivors' organizations, human rights groups, and the United Nations are a testament to the fact that the cruel and vicious nature of the violence carried out during the Rwanda genocide 'assumed gender-specific forms, affecting females differently than males.'⁵ Approximately 250,000 Rwandan women were subjected to various forms of sexual violence including rape, sexual torture, sexual mutilation, and sexual slavery, often at the hands of HIV-positive men, during and after the genocide.⁶ More recently, in Sierra Leone, it is estimated that 215,000-257,000 women have been targets of rape, sexual mutilation, forced labour, forced conscription, and sexual slavery.⁷ Although the nature and circumstances of the conflicts in Rwanda and in Sierra Leone were markedly different, in both countries women were specifically targeted as victims of rape, sexual violence, sexual torture, sexual mutilation, and sexual slavery. In both cases, sexual and gender-based violence was systematic, particularly brutal, and widespread, and its effects protracted, complex, and multi-layered.

The horrific acts of sexual and gender-based violence inflicted upon women and girls in conflict situations result in permanent scars on the collective psyche of each society. The impact of such atrocities is immeasurable. What is more evident, however, is the fact that '[m]ass violence results in the breakdown of societal structures—social and economic institutions, and networks of familial and intimate relationships that provide the foundation for a functioning community.'⁸ Given this situation, the pursuit of justice must not only be done, but seen to be done, and this must include implementing measures that ensure not only that the perpetrators are held accountable for their actions, but that adequate redress is provided for the victims of these gross violations of human rights in order to provide a solid foundation for the rebuilding of such fragmented societies.

⁵ Ibid.

⁶ United Nations 'Report on the Situation of Human Rights in Rwanda submitted by René Degni-Ségui, Special Rapporteur of the Commission for Human Rights' (1996) (E/CN.4/1996/68). Available at <http://www1.umn.edu/humanrts/commission/country52/68-rwa.htm> [Accessed on 5 May 2006].

⁷ Binaifer Nowrojee, 'Making the invisible war crime visible: post conflict justice for Sierra Leone's rape victims' *Harvard Human Rights Journal* (2005) 18: 85 at 90.

⁸ Laurel Fletcher and Harvey Weinstein 'Violence and social repair: rethinking the contribution of justice to reconciliation' *Human Rights Quarterly* (2002) 24: 573 at 576.

When faced with a society recovering from such mass atrocities, countries have a legal obligation to provide redress for the victims. According to Weinstein and Stover, 'individuals need some form of justice to acknowledge the wrongs done to them, just as societies need it to establish boundaries by which individuals can be held responsible for their behaviour toward their fellow citizens.'⁹

With regards to crimes of sexual and gender-based violence, particularly those that were systematic and widespread such as the examples cited above, acknowledgement and accountability are central to the process of rebuilding a functioning society. According to Sierra Leonean survivor and activist Isha Dyfan, '[w]e need to hear that these atrocities are condemned to at least relieve some of the shame and the grief. It is not just a legal issue. It is about people's lives. Something must be done so the society that was affected by the conflict can invest in peace.'¹⁰ Since women have historically been underrepresented in the judicial process,¹¹ it is imperative that provisions are made in international human rights and international humanitarian law that 'take women's experiences of sexual violence as a starting point rather than just a by-product of war.'¹²

It is worth noting, however, that as a result of developments in international law over the past twelve years, it is now possible to convict perpetrators of sexual violence for rape as a war crime, a crime against humanity, or as an act of genocide or torture if their actions meet the elements of each. These developments are reflected in the statutes and case law of the ad-hoc international tribunals (the International Criminal Tribunal for the Former Yugoslavia [ICTY] and the International Criminal Tribunal for Rwanda [ICTR]), the Statute of International Criminal Court, and the statute of 'hybrid courts',¹³ such as the

⁹ Harvey M. Weinstein and Eric Stover 'Introduction: Conflict, Justice, and Reclamation' in Eric Stover and Harvey Weinstein (eds.) *My neighbor, my enemy: justice and community in the aftermath of mass atrocity* (2004): 1 at 11.

¹⁰ Nowrojee *Supra* note 7 at 88.

¹¹ *Ibid.*, at 89.

¹² Kelly Dawn Askin as cited in Elisabeth Rehn and Ellen Johnson Sirleaf 'Women, war, peace: the independent experts' assessment on the impact of armed conflict on women and women's role in peacebuilding (Progress of the world's women)' (2002) 1: 89. Available at <http://www.womenwarpeace.org> [Accessed on 5 September 2006].

¹³ Project on International Courts and Tribunals 'Hybrid Courts.' Available at <http://www.pict-pcti.org/courts/hybrid.html> [Accessed 24 August 2006].

Special Court for Sierra Leone. Furthermore, perpetrators can be convicted for acts of sexual violence in both internal and international conflict, and leaders in positions of command responsibility (i.e. those in the position to issue orders) who knew or should have had reason to know of such abuses and who took no steps to stop subordinates who committed sex crimes, can be held accountable.¹⁴

In spite of these laudable developments, however, numerous obstacles and barriers to justice for survivors of sexual and gender-based violence persist both at the national and international level mainly due to shortcomings in the *implementation* of international human rights law. Transitional societies are tasked with the responsibility of ensuring that their approach to transitional justice reflects the above legal developments, but unfortunately, these developments do not always translate in terms of implementation at the domestic level. It must be noted that failing to address crimes of sexual and gender-based violence is a betrayal not only of the direct victims of conflict, but of society as a whole. Furthermore, the failure encourages a lack of respect for human rights and nurtures a culture of impunity that will inevitably lay the groundwork for renewed conflict. In the aftermath of conflict, therefore, transitional societies must seek to break the impending cycle of violence and identify sustainable solutions through an appropriate form of transitional justice that will ensure the reconstruction of a society that adheres to the rule of law and that will not tolerate violations of human rights.

The ultimate goal of transitional justice is to contend with the effects of mass atrocities committed during conflict in order to achieve justice and reconciliation, create sustainable peace, and prevent future conflict.¹⁵ Thus far, two theories of transitional justice have gained worldwide recognition—the retributive and the restorative justice theories. Each proposes a different approach to achieving the aims of transitional justice: justice and reconciliation. Proponents of retributive justice argue in favour of individual

¹⁴ Nicole Laviolette 'Command rape: Sexual violence, command Responsibility and the prosecution of superiors by the International Criminal Tribunals for the Former Yugoslavia and Rwanda' 36 *Canadian Yearbook of International Law* (1998): 95.

¹⁵ Jeremy Sarkin 'The tension between justice and reconciliation in Rwanda: politics, human rights, due process and the role of the gacaca courts in dealing with the genocide' *Journal of African Law* (2001) 45 2: 143 at 175 (2001).

prosecutions and punishment, while proponents of restorative justice maintain that justice and reconciliation can only be achieved through dialogue and community participation.

I.3 Aim

There is, however, a more effective middle-ground approach to transitional justice. From the outset of the justice process (investigation of crimes) to the conclusion and beyond (e.g. provision of counselling and healthcare), a successful model of transitional justice must take the special needs of victims of sexual and gender-based violence into consideration and at the same time, institute the necessary judicial and procedural safeguards. A comprehensive model, therefore, should be the ideal. It should contain elements of punishment of perpetrators in order to eradicate impunity for such crimes, but it should also heed the voices of the victims; involve the community, institute specialized measures to ensure the privacy and protection of the victims; and recognize that the transitional justice process for such crimes necessitates the sensitisation of personnel and also of the community in general.

This dissertation will examine the challenges and limitations facing various mechanisms of transitional justice when dealing with crimes of sexual and gender-based violence, particularly in the Rwandan context. Having emerged from one of the worst mass atrocities in recent history, Rwanda has been faced with the ongoing challenge of identifying the appropriate transitional justice mechanisms. This dissertation will demonstrate, through an analysis of transitional justice mechanisms utilized in the Rwandan context, that the use of a single model of transitional justice—whether retributive or restorative—limits a society's ability to sufficiently address crimes of sexual or gender-based violence and to satisfactorily ensure the realization of both justice and reconciliation. This study proposes that the more effective approach to transitional justice must be comprehensive in nature, incorporating key elements of both retributive and restorative justice, and taking into account the particular legal, political, and socio-economic circumstances of the particular society. This is of paramount importance in the context of sexual and gender-based violence where often the effects of such crimes are

sustained, complex, and multi-layered, and therefore require specialized attention to ensure the achievement of the aims of transitional justice.

I.4 Methodology

To carry out my research, I will draw upon research reports, quantitative studies, texts, and articles on transitional justice, and on the nature, prevalence, and impact of crimes of sexual violence that were committed during conflict situations, particularly in Rwanda. I will also analyse relevant cases brought before the International Criminal Tribunal for Rwanda (ICTR), as well as the Statute of the International Criminal Tribunal for Rwanda, the Rome Statute of the International Criminal Court, and the Statute of the Special Court for Sierra Leone. I will further analyse the domestic legislation in Rwanda including Rwanda's Organic Laws concerning the prosecution of crimes of genocide and the establishment and functioning of the *gacaca* courts, and will draw upon studies conducted on the implementation of this legislation.

I.5 Significance and Scope

The significance of this dissertation is to illustrate that advancements in the international law concerning sexual and gender-based violence are essentially rendered useless without the institution of appropriate measures with which to implement the law. According to Copelon, 'gender justice—which is among the most vehemently resisted aspects of international criminal law—is both profoundly revolutionary and one of the ultimate tests of universal justice.'¹⁶ This is because gender justice in its entirety refers not only to providing for gender-based crimes within the law, but also for instituting the necessary procedures to ensure that justice is realized for victims of these crimes. This includes ensuring that crimes of sexual and gender-based violence are considered equally as grave as other war crimes, crimes against humanity, and crimes of genocide. In fact, Nowrojee asserts that '[g]iven its routine widespread and systematic use, virtually every case coming before the international criminal courts should seek accountability for sexual

¹⁶ Rhonda Copelon 'Gender crimes as war crimes: Integrating crimes against women into international criminal law' (2000) *McGill Law Journal* 46: 217 at 220.

violence crimes.’¹⁷ Instead, however, ‘[s]exual violence remains the invisible war crime. It remains a continuing challenge in the fight against invisibility to ensure that women's experiences are not ignored in this era of international justice.’¹⁸ Despite international legal developments, however, crimes of sexual violence continue to take place in Africa both within and outside the context of conflict situations. According to Amnesty International, in the Democratic Republic of the Congo (DRC) at least 240,000 female civilians, girls and women were raped at the hands of various militiamen between 1999 and 2005.¹⁹ The DRC’s ‘legacy of mass rape,’ as detailed in a Human Rights Watch Report, continues relatively unabated due to the ‘almost absolute levels of immunity’ attached to crimes of sexual violence.²⁰ Moreover, tales of rape, sexual torture and sexual mutilation have emerged out of the situations of conflict and/or general instability in Sierra Leone, Somalia, Sudan, and Uganda. Most recently, a United Nations Human Rights Commission issued a report detailing accounts of various crimes against humanity occurring in the Sudan, including the establishment of rape camps in which women and girls are kept naked.²¹ The prevalence of these crimes to this day illustrates that there remains much to be done in order to ensure that such crimes are not ignored and allowed to remain invisible.

The invisibility of such crimes goes far beyond the legal sphere, and permeates into the socio-economic sphere: victims of sexual violence require more than legal redress to ensure that justice is realized. Acts of sexual violence may continue to be rendered invisible if mechanisms are not put in place at the international and national levels to address such crimes. As long as steps are not taken to ensure the prevention of recurrence of such crimes, whether during conflict or in the aftermath of conflict, there is a very real

¹⁷ Binaifer Nowrojee ‘We can do better: investigating and prosecuting international crimes of sexual violence’ (2004). Available at <http://www.ictj.org/static/Africa/Rwanda/RwandaExecSum.pdf> http://www.womensrightscoalition.org/publications/papers/doBetter_en.php [Accessed on 5 September 2006] at 2.

¹⁸ Ibid.

¹⁹ Rory Carroll ‘Eight years of darkness’ *The Guardian* 31 January 2005.

²⁰ Julianne Kippenberg ‘Democratic Republic of the Congo—The legacy of mass rape: Prosecuting sexual violence in the Congo war,’ unpublished report cited in Cherie Booth and Max Du Plessis ‘The international criminal court and victims of sexual violence’ *South African Journal of Criminal Justice* 18 (2005) 3: 241 at 242.

²¹ Nicholas Kristof ‘Bush puts ideology over lives in Sudan’ *The New York Times* 3 February 2005.

danger that sexual violence will retain its status as the invisible crime. This issue will be explored in the context of post-genocide Rwanda, in order to illustrate that even when crimes of sexual and gender-based violence are provided for statutorily in both international and national law, the implementation process continues to be an uphill struggle.²² In dealing with sexual and gender-based violence, Rwanda's transitional justice mechanisms have faced numerous limitations and challenges and the country's experience thus far demonstrates the need for transitional societies to institute a comprehensive model of transitional justice.

I.6 Conclusion

This dissertation comprises five chapters, including the present introductory chapter, which sets out the background of sexual and gender-based violence in conflict situations, and the aim, and significance and scope, of the dissertation. Given the prevalence of sexual and gender-based violence throughout history, Chapter II illustrates the international legal response to such crimes by examining the statutory and jurisprudential developments made thus far in terms of international law. The aim of this chapter is to illustrate the codification of crimes of sexual and gender-based violence at the international level and to note that despite the significance of these developments, the aims and goals of transitional justice cannot be met without establishing the appropriate mechanisms through which to implement these laws. Chapter III sets out the principles of transitional justice and outlines the arguments for and against a strictly retributive or a strictly restorative approach to transitional justice. This chapter establishes that in order to attain the goals of transitional justice, a country must employ a comprehensive model that incorporates key aspects of both restorative and retributive justice, that bridges the gap between international and domestic law, and that takes into consideration the specific circumstances of the post-conflict society in question. Chapter IV provides an illustration of how a post conflict society contends with crimes of sexual and gender-based violence by drawing on Rwanda's transitional justice experience thus far, outlining the

²² Human Rights Watch *Struggling to survive: barriers to justice for rape victims in Rwanda* (2004); Binaifer Nowrojee 'Your justice is too slow': will the ICTR fail Rwanda's rape victims?' (2004). Available at www.womensrightscoalition.org/pdf/binaifer_paper.pdf [Accessed on 12 November 2006].

developments achieved and the challenges faced by the International Criminal Tribunal for Rwanda, the national courts, and the traditional *gacaca* courts as pertains to crimes of sexual and gender-based violence. Finally, Chapter V concludes that in order to ensure that crimes of sexual and gender-based violence do not remain invisible and/or subordinate to other gross violations of human rights law, transitional justice mechanisms must institute specialized measures, and take into account the society's historical, political, and socio-economic circumstances in order to realize true justice, effect sustainable reconciliation, eradicate a culture of impunity, and ensure the prevention of future violations.

It has been established in this chapter that sexual and gender-based violence are part and parcel of conflict, and have been so throughout history. Despite the frequency and prevalence of the use of sexual violence as a weapon, however, crimes of sexual violence against women and girls whether during or in the aftermath of conflict, have been shrouded in silence thereby rendering them essentially invisible throughout history. The following chapter will discuss the status of sexual and gender-based violence within the context of international law, outlining the statutory and jurisprudential developments that have led to the current criminalisation of such acts.

II Developments in International Law Regarding Sexual and Gender-Based Violence

II.1 Introduction

Sexual and gender-based violence has been intrinsically intertwined with conflict situations throughout history. Rape and other forms of sexual violence continue to be used as weapons of war by official armies as well as by militia groups and rebel forces. However, as established in Chapter I, despite the prevalence of sexual and gender-based violence during conflict situations over decades, these human rights violations have not received much international attention particularly in the legal arena until recent years, and even then, the criminalisation of such acts has been a long and arduous process. This chapter will initially explore the shortcomings inherent in the legal processes regarding failure to prosecute conflict-related crimes of sexual and gender-based violence. The chapter will thereafter examine the international legal developments that have culminated in existing definitions of, and have established individual criminal responsibility for, crimes of sexual and gender-based violence. The aim of this chapter is to illustrate the criminalisation of acts of conflict related sexual and gender-based violence thereby establishing the international legal context for the transitional justice process.

II.2 International law in the context of sexual violence

Contributing to the conspiracy of silence surrounding crimes of sexual and gender-based violence are the notions of rape as simply a private act or as an attack on a woman's personal honour. These notions have been prevalent throughout history and have ensured that acts of sexual violence that take place during internal or international conflicts have remained largely ignored, prompting current various experts to refer to sexual violence as 'the invisible crime.'²³ It is important to note that even though individual criminal responsibility for war crimes and crimes against humanity was first established during the post-World War II prosecutions held at the International Military Tribunals (IMT), rape

²³ See Nowrojee *Supra* note 7.

was not included in the charter establishing the tribunals, nor was it charged as a separate offence in either the Nuremburg or the Tokyo tribunals.²⁴ Yet rape and sexual slavery were prevalent during the war, as illustrated by the abduction and transportation of over two hundred thousand girls and women of non-Japanese origin from Japanese occupied territories to rape camps known as ‘comfort stations.’²⁵ Although knowledge of the existence of these camps must have been fairly widespread due to the incredibly large number of women and young girls that was targeted, there were no subsequent prosecutions for rape and/or sexual slavery.

Even when accusations of sexual violence were introduced in the Tokyo tribunal, ‘they were rejected as the judge found it too difficult to prove that the women had not given their consent to sexual intercourse.’²⁶ Copelon correctly attributes the failure to prosecute these acts to the ‘privatisation of sexual violence in patriarchal culture.’²⁷ In the rare instance that rape, for example, was recognized as a war crime, it was done implicitly so and viewed less as an attack on a person, as an attack against the honour of a State or an ethnic group.²⁸ This is evident in the 1949 Geneva Conventions in which crimes of sexual violence were not included in Common Article 3 which provides for minimum measures of protection during armed conflict. Rather, within the scope of the Convention, they were categorized as ‘outrages upon personal dignity, in particular, humiliating and degrading treatment’²⁹ or as an ‘attack against a woman’s honour.’³⁰ In addition, within the 1977 Additional Protocols to the Geneva Conventions, crimes of sexual violence are considered solely in terms of honour and dignity.³¹

²⁴ *Charter of the International Military Tribunal for the Trial of Major War Criminals*, appended to *Agreement for the Prosecution and Punishment of Major War Criminals of the European Axis*, 8 August 1945, London, as amended *Protocol to Agreement and Charter*, 6 October 1945, 82 UNTS 279, 57 Stat. 1544. Available at <http://www.yale.edu/lawweb/avalon/imt/proc/imtconst.htm> [Accessed on 12 December 2006]. See also Lyth *Supra* note 1 at 4 and Copelon *Supra* note 16 at 220.

²⁵ Copelon *Supra* note 16 at 220.

²⁶ Lyth *Supra* note 1 at 4.

²⁷ Copelon *Supra* note 16 at 220.

²⁸ *Ibid.*, at 221.

²⁹ *Geneva Conventions*, 12 August 1949.

³⁰ *Convention Relative to the Protection of Civilian Persons in the Time of War (Fourth Geneva Convention)* 12 August 1949 at Article 27.

³¹ *Additional Protocol to the Geneva Conventions of 12 August 1949 and relating to the Protection of Victims of the International Armed Conflicts (Additional Protocol I)*, 8 June 1977 at Articles 75(2) and 76;

Defining sexual violence merely as a question of honour results in the separation of such crimes from other grave breaches of human rights law and, as such, creates a most profound obstacle to ensuring gender justice throughout history. Not only has this definition led to the relegation of such crimes to second-class status, but it has also led to categorization of such crimes as only moral crimes,³² thereby ensuring their exclusion from the field of international criminal law for decades. According to Copelon, '[i]f not invisible, [sexual violence] was trivialized; if not trivialized, it was considered a private matter or justified as an inevitable by-product of war, the necessary reward for fighting men.'³³ Whatever the case, although sexual violence has always been part and parcel of conflict situations, whether international or internal, it has also always been deemed to be of little or no importance, publicly.

This view of crimes of sexual violence as tertiary war crimes or as private acts negates the impact of these acts and has contributed to the general culture of impunity surrounding sex crimes at the international level. Consequently, despite the fact that acts of sexual violence tend to be included in and occur contemporaneously with acts of slavery, torture and genocide, they have generally not been accorded the same gravity as other war crimes, crimes against humanity, or crimes of torture.³⁴ Crimes of sexual and gender-based violence, however, are not in any way secondary to other violations of international human rights law, and because of the contexts within which they are perpetrated—environments charged with hostility, intimidation, brutal violence—they are far from private in nature and are in fact harnessed as weapons of war. Regardless, it has taken decades for such crimes to receive recognition in the sphere of international law.

Within the last decade, developments at the international level, in terms of the institution of transitional justice mechanisms, legislation and jurisprudence, have contributed to the

Additional Protocol to the Geneva Conventions of 12 August 1949 and Relating to the Protection of the Victims of Non-International Armed Conflicts (Additional Protocol II) 8 June 1977 at Article 4(2) (e).

³² Rhonda Copelon 'Surfacing gender: re-engraving crimes against women in humanitarian law' (1994) Cited in Lyth *Supra* note 1 at 5.

³³ Copelon *Supra* note 16 at 220.

³⁴ Rehn and Johnson Sirleaf *Supra* note 12 at 93.

establishment of international criminal responsibility for sexual and gender-based violence. In the 1990s, the situations in the former Yugoslavia and Rwanda drew international attention to the gross violations of human rights that occurred during campaigns of genocide and ethnic cleansing. With the use of rape camps in Yugoslavia, for example, the existence of sexual violence as a weapon of armed conflict could no longer be ignored by the international community.³⁵ According to Simon Chesterman, the events in Rwanda and the former Yugoslavia illustrated that the purpose of sexual aggression against women was to serve as a horrific public display of domination where the 'rape of the woman's body symbolically represents the rape of the community itself.'³⁶ Throughout the 1990s, various United Nations World Conferences were held, from Vienna in 1993 to Cairo in 1994 to Beijing in 1995, in which the principles for codifying international law on violence against women began to be prioritised and recognized.³⁷ These principles eventually contributed to the landmark decisions made by the United Nations ad-hoc Tribunals (the International Criminal Tribunal for the Former Yugoslavia [ICTY] and the International Criminal Tribunal for Rwanda [ICTR]).³⁸ In 1996, for example, the ICTR made history in *Prosecutor v Jean Paul Akayesu*³⁹ (hereafter, the *Akayesu* case), which marked the first time an international criminal tribunal convicted an individual for genocide and international crimes of sexual violence. This decision ultimately informed subsequent definitions of crimes of sexual violence and represented the international commitment to prosecuting crimes of sexual violence which has been enshrined in numerous international instruments, including the statutes of the 'hybrid courts,'⁴⁰ and the Rome Statute of the International Criminal Court which provides for crimes of sexual violence as genocide, war crimes, and as crimes against humanity.

II.3 Development of International Mechanisms of Transitional Justice

³⁵ See Tadeusz Mazowiecki *Supra* note 2.

³⁶ Simon Chesterman 'Never again ... and again: Law, order, and the gender of war crimes in Bosnia and beyond' *Yale Journal of International Law* (1997) 22: 299 at 327-8.

³⁷ Rehn and Johnson Sirleaf *Supra* note 12 at 91

³⁸ *Ibid.*

³⁹ *Prosecutor v Jean Paul Akayesu* ICTR (Trial Chamber) Case No. ICTR-96-4-T (2 September 1998). Available at www.ictt.org [Accessed on 23 September 2006] (hereafter, *Akayesu* case).

⁴⁰ PICT *Supra* note 13.

There are various mechanisms through which these developments in international law are implemented including ad-hoc tribunals, a permanent international court, and ‘hybrid courts’. Societies emerging from conflicts wherein gross human rights violations were perpetrated on a massive scale are usually left unable to address these violations strictly at the national level. This is due most often to a previous culture of impunity in terms of such violations, lack of appropriate infrastructure, an overwhelming number of accused to be investigated and prosecuted, and inadequate laws. International courts and tribunals play a significant role in the enforcement of international human rights law where countries are either unwilling or unable to try suspected perpetrators of human rights violations. As such, in addition to national courts, these international mechanisms have been relied on by post-conflict societies in recent years in order to establish individual criminal accountability. It will be necessary, therefore, to briefly describe examples of international mechanisms of transitional justice so as to establish the conceptual legal framework within which crimes of conflict-related sexual and gender-based violence are addressed

II.3.1 Ad-hoc tribunals: International Criminal Tribunal for Rwanda (ICTR)

In response to two of the most horrific conflicts in recent history, the United Nations established the International Criminal Tribunal for Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR) in 1993 and 1994 respectively. These ad-hoc tribunals have been the first international mechanisms of transitional justice to include crimes of sexual violence in their statutes as crimes, as opposed to violations of honour. However, the most significant developments made by the tribunals have been in terms of jurisprudence. In the case of Rwanda, the ICTR was established, as per the United Nations Security Council Resolution 955 of November 8 1994, in order to prosecute ‘persons responsible for genocide and other serious violations of international humanitarian law committed on the territory of Rwanda, and the prosecution of Rwandan citizens responsible for the genocide and other such violations of international law committed on the territory of neighbouring States, between 1 January 1994 and 31

December 1994.’⁴¹ The inclusion in the mandate of the tribunal’s contributions to peace and reconciliation is what distinguishes it from the mandate of the ICTY, which makes no mention of the tribunal’s role in facilitating reconciliation.⁴² The success or failure of the ICTR in achieving this goal will be examined in further detail in Chapter IV when examining the tribunal’s strengths and weaknesses particularly concerning crimes of sexual and gender-based violence. Although the ICTY will not be examined in detail for present purposes, it is crucial to note that as the first international tribunal established since the Nuremburg and Tokyo IMTs, it holds the distinction of also being the first tribunal to address gender-based crimes.

II.3.2 Permanent International Court: International Criminal Court (ICC)

The International Criminal Court (ICC) is a permanent judicial body, established by the Rome Statute of 17 July 1998, which entered into force on July 1 2002. Within the international community, the issue of creating a permanent criminal court had been under consideration since the Nuremberg Trials (1945-1949) and in 1948, the General Assembly of the United Nations directed the International law Commission to examine the possibility of creating a permanent international criminal court.⁴³ In the 50 years between then and the year the Rome Statute was adopted, the field of international criminal law advanced significantly, as illustrated by the Statute itself. In fact, according to Antonio Cassese, ‘[i]t is the enactment of the ICC Statute which represents the pinnacle of the institutionalisation and universalisation of measures for the enforcement of international humanitarian law.’⁴⁴ The Rome Statute is the first international treaty to recognize sexual and gender-based violence as grave breaches of international law, thereby contributing immeasurably to the advancement of international human rights law.

⁴¹ See PICT website *Supra* note 13 and *The Statute of the International Tribunal for Rwanda* (1994) at Articles 1 and 8. Available at www.icttr.org [Accessed on 25 August 2006] [hereafter, ICTR Statute].

⁴² Payam Akhavan ‘The international criminal tribunal for Rwanda: the politics and pragmatics of punishment’ *The American Journal of International Law* (1996) 90: 501-510.

⁴³ Antonio Cassese ‘From Nuremberg to Rome: International military tribunals to the international criminal court’ in A. Cassese, P Gaeta and J Jones (eds) *The Rome Statute of the International Criminal Court: a Commentary* (2002) 1 at 3.

⁴⁴ *Ibid.*, at 4.

II.4 Statutory and Jurisprudential Developments

With regard to the ad-hoc tribunals, despite the fact that only a fraction of the cases have actually been prosecuted at the ICTR and the ICTY, significant jurisprudential progress has been made in terms of crimes of sexual violence, reflecting the key statutory developments contained in the constitutive documents of the tribunals. According to Rehn and Johnson Sirleaf, the ad-hoc tribunals ‘have raised the standards of accountability for crimes of sexual violence against women’ and their judgments have ‘set historic precedents in prosecuting war crimes, crimes against humanity and genocide’.⁴⁵ In the ICTR’s landmark *Akayesu* case, the court broadened the previously restrictive definition of the crime of rape under international law and defined it as involving ‘a physical invasion of a sexual nature, committed on a person under circumstances which are coercive’⁴⁶ that may or may not involve sexual intercourse. Following this precedent, the ICTY attempted to further elaborate on the above definition in both the *Furundzija* case⁴⁷ and the *Kunarac* case.⁴⁸ The latest decision on the definition of rape was made in *Prosecutor v Muhimana* in which the Trial Chamber of the ICTR harmonized the definitions and elements of rape established in *Akayesu* and *Kunarac/Furundzija*.⁴⁹

The *Akayesu* case was the first case heard before the ICTR and, because of the historically momentous findings made in this case, it is lauded as possibly ‘the most important decision rendered thus far in the history of women’s jurisprudence.’⁵⁰ Subsequent decisions in both ad-hoc tribunals have resulted in a considerable body of

⁴⁵See Rehn and Johnson-Sirleaf *Supra* note 12. Note that the ICTY and ICTR have upheld convictions of rape and other forms of sexual violence as instruments of genocide (*Akayesu*), crimes against humanity (*Akayesu*, *Kunarac*), war crimes (*Celebici*, *Furundzija*), forms of torture (*Kunarac*, *Celebici*, *Furundzija*), means of persecution (*Kvocka*), and forms of enslavement (*Kunarac*).

⁴⁶ *Akayesu* case *Supra* note 39 at para 598.

⁴⁷ *Prosecutor v Furundzija* ICTY (Trial Chamber II) Case no. IT-95-17/IT (10 December 1998) at para. 185. Available at www.un.org/icty [Accessed 1 September 2006] (hereafter, *Furundzija* case).

⁴⁸ *Prosecutor v Kunarac* ICTY (Trial Chamber II) Case no IT-96-23-T (22 February 2001) at para 460. Available at www.un.org/icty [Accessed 1 September 2006] (hereafter, *Kunarac* case).

⁴⁹ *Prosecutor v Muhimana*, ICTR (Trial Chamber) Case no ICTR-95-1-I (28 April 2005).

⁵⁰ Kelly Askin ‘Women’s issues in international criminal law: Recent developments and the potential contribution of the ICC’ in Dinah Shelton (ed) *International Crimes, Peace, and Human Rights: The Role of the International Criminal Court* (2000): 52 at 52.

jurisprudence that recognize rape and other forms of sexual violence as grave breaches of international criminal law. This jurisprudence, in turn, proved to be a most important foundation for the codification of sexual violence as part of the substantive jurisdiction of the International Criminal Court.⁵¹ The ICTR's most recent and perhaps notorious case concerning sexual and gender-based violence is that of *Prosecutor v Pauline Nyiramasuhuko* in which Rwanda's former Minister for the Family and Women's Development is standing trial on charges of genocide, war crimes, and crimes against humanity.⁵² Nyiramasuhuko is the first woman in the history of international law to be charged, specifically, with rape as a crime against humanity for her active encouragement of the rape of Tutsi women at the hand of the *Interahamwe* militia.⁵³ Her indictment and subsequent trial reflect the monumental leaps and bounds that have occurred within the international legal sphere enabling the establishment of individual criminal responsibility for conflict and sexual based violence. These developments have ultimately resulted in the clarification and legal codification of the definition of rape, as discussed above, crimes of sexual and gender-based violence have also been enshrined as crimes of genocide, war crimes, and crimes against humanity.

II.4.1 Sexual Violence as a Crime of Genocide

Genocide was initially defined in the 1948 Convention on the Prevention and Punishment of the Crime of Genocide, and is considered a crime of customary international law. Acts of genocide are committed with the intent to destroy, in whole or in part, a national, ethnical, racial or religious group, by killing or causing serious bodily or mental harm to members of the group, deliberately inflicting conditions calculated to bring about destruction of the group in whole or in part, imposing measures intended to prevent births or forcibly transferring children of the group to another group.⁵⁴ The statutes of the ad-hoc tribunals provide for genocide in Articles 2 and 4 of the ICTR and the ICTY

⁵¹ Copelon *Supra* note 16 at 231.

⁵² *Prosecutor v Pauline Nyiramasuhuko et al.* (Trial Chamber) Case No. ICTR-97-21-T (3 September 1997). Available at www.ictt.org [Accessed on 23 September 2006].

⁵³ 'Nyiramasuhuko & two other suspects plead not guilty to rape & genocide charges', *Africa News Service* (13 August 1999); See also Adam Jones, 'Gender and genocide in Rwanda' *Journal of Genocide Research* 4 (2002) 1: 65 at 83.

⁵⁴ *Convention on the Prevention and Punishment of the Crime of Genocide* (1948) at Article 2.

respectively, and include in their definition a list of punishable genocidal acts. In the *Akayesu* case, for example, one of the most significant contributions made by the ICTR was the finding that rape can amount to genocide. In this landmark decision, the Tribunal found that the accused had the requisite mental element (*mens rea*) to commit genocide, which he had exhibited through supervising, enabling and encouraging the systematic rape of Tutsi women. The tribunal held that the systematic rape aimed at Tutsi women was part of the campaign to mobilize the Hutu against the Tutsi, and the sexual violence itself was aimed at destroying the spirit, will to live, or will to procreate, of the Tutsi group.⁵⁵ The effect of this decision is later reflected in the Rome Statute which provides for Genocide in Article 6 as a ‘serious bodily or mental harm,’ which is clarified in the Statute’s Elements of Crime to include acts of torture, rape, sexual violence or inhuman or degrading treatment. This is most significant because it recognizes rape, sexual violence, and sexual torture alongside other egregious violations of human rights that constitute crimes of genocide.

II.4.2 Sexual Violence as a War Crime

In addition to categorizing rape and sexual violence as crimes of genocide, legal developments have enabled such crimes to fall under the category of war crimes. War crimes constitute serious violations of both customary and conventional international humanitarian law and include grave breaches of Common Article 3 of the 1949 Geneva Conventions. In terms of sexual and gender-based violence, Article 27 of the Fourth Geneva Convention States that women should be protected against ‘rape, enforced prostitution, or any form of indecent assault’ in times of war⁵⁶. The Statute for the International Tribunal of the Former Yugoslavia (hereafter, ICTY Statute) provides for war crimes in Articles 2 and 3, and ICTY case law have further consolidated the definition of rape and other forms of sexual violence as serious violations of international humanitarian law. In the *Prosecutor v Furundzija*, for example, a paramilitary leader was convicted of outrages upon personal dignity and torture by means of rape (a violation of

⁵⁵ *Akayesu* case *Supra* note 39 at para 732.

⁵⁶ *Supra* note 27 at Article 27.

Common Article 3 to the Geneva Conventions, constituting a serious violation of the laws or customs of war) for verbally interrogating a woman in front of laughing soldiers while his colleague physically raped her.⁵⁷ The Statute of the International Tribunal for Rwanda (hereafter, ICTR Statute) further defines rape as a war crime in Article 4, which provides for the prosecution of violations of Common Article 3 and of Additional Protocol II of the Geneva Conventions.⁵⁸ Crimes of sexual violence are further clarified as war crimes in Article 8 of the Rome Statute, ‘in particular when committed as part of a plan or policy or as part of a large-scale commission of such crimes.’⁵⁹ Article 8 includes in its definition of war crimes ‘committing outrages upon personal dignity, in particular humiliating and degrading treatment’⁶⁰ and ‘committing rape, sexual slavery, enforced prostitution, forced pregnancy..., enforced sterilization, or any other form of sexual violence also constituting a grave breach of the Geneva Conventions’ in both international⁶¹ and internal⁶² conflicts. Furthermore, sexual violence constitutes torture as a war crime, provided that the sexual attack occurs during armed conflict for one of the traditional purposes of torture: extracting information or a confession, punishment, intimidation or coercion, or in order to discriminate.⁶³ This comprehensive definition provides for a wide variety of crimes of sexual violence, committed during both internal and international conflict, to be prosecuted as war crimes: a noteworthy development, the significance of which is mirrored in the further categorization of such crimes as crimes against humanity.

II.4.3 Sexual Violence as a Crime against Humanity

In order to constitute a crime against humanity, acts of sexual violence must be widespread or systematic, with knowledge of the attack, and can thereby be prosecuted whether they occur during or in the aftermath of conflict. Both statutes of the ad-hoc

⁵⁷ *Furundzija* case *Supra* note 47.

⁵⁸ ICTR Statute *Supra* note 41 at Article 4.

⁵⁹ *Rome Statute of the International Criminal Court* (1998) at Article 8. Available at <http://www.un.org/law/icc/statute/romefra.htm> [Accessed on 1 September 2006] (hereafter, Rome Statute).

⁶⁰ *Rome Statute* *Supra* note 59 at Article 8(b)(xxi)

⁶¹ *Ibid.*, at Article 8(b)(xxii).

⁶² *Ibid.*, at Article 8(e)(vi).

⁶³ Booth and du Plessis *Supra* note 20 at 254.

tribunals provide for rape and sexual violence as crimes against humanity in both internal and international conflict in Articles 5 and 3 of the ICTY and the ICTR respectively.⁶⁴ Rape is explicitly listed among the crimes against humanity within the jurisdictions of both ad-hoc tribunals, and in the cases of *Akayesu* and *Prosecutor v Kunarac*,⁶⁵ the Tribunals convicted the accused of rape as a crime against humanity when the crimes were committed during the course of a widespread or systematic attack against civilians. In *Akayesu*, the Trial Chamber drew comparisons between rape and torture as defined in the 1984 Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (Torture Convention), holding that:

Like torture, rape is used for such purposes as intimidation, degradation, humiliation, discrimination, punishment, control or destruction of a person. Like torture, rape is a violation of personal dignity, and rape in fact constitutes torture when inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity.⁶⁶

Equating rape with torture was a key step towards consolidating the legal status of rape and sexual violence as crimes against humanity. Building upon this step, Article 7 of the Rome Statute incorporates the principle that sexual violence must be seen as part of other egregious forms of violence, such as enslavement and torture.⁶⁷ The Statute defines crimes against humanity as acts of violence committed as part of a widespread or systematic attack directed against any civilian population with knowledge of the attack⁶⁸ and this includes not only rape, but sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence of comparable gravity.⁶⁹ It is important to note that the Statute provides for both sexual slavery and enslavement as a crime against humanity, with the latter being defined as ‘the exercise of any or all of the powers attaching to the right of ownership over a person and includes the exercise of such power in the course of trafficking in persons, in particular women and

⁶⁴ ICTR Statute *Supra* note 41 at Article 5 and *Statute of the International Tribunal for the Former Yugoslavia* (1993) at Article 3. Available at www.un.org/icty [Accessed 12 August 2006].

⁶⁵ *Kunarac* case *Supra* note 48.

⁶⁶ *Ibid.*, at para 687.

⁶⁷ Copelon *Supra* note 16 at 234.

⁶⁸ *Rome Statute* *Supra* note 59 at Article 7.

⁶⁹ *Ibid* at Article 7(1)(g).

children.’⁷⁰ The inclusion of the latter caveat in the definition allows for prosecution of crimes against women that may or may not be sexual in nature, such as situations in which women and children are kidnapped and held in order to serve as labourers or as foot soldiers, as was the case in Sierra Leone.

In addition, the Statute’s definition of torture as a crime against humanity is so broad that it allows for acts of sexual violence to be included within its definition. For the purposes of the crime against humanity of torture, the perpetrator must have inflicted severe physical or mental pain or suffering upon one or more persons who were in the perpetrator’s custody or under his control.⁷¹ The pain or suffering must have been committed as part of a widespread or systematic attack directed against a civilian population, and the perpetrator must have been aware that the conduct was part of such an attack or intended it to be such.⁷² This broad definition of torture widens the sphere within which crimes of sexual and gender-based violence can be prosecuted, and this is significant because it prevents such crimes from falling between the cracks due to lack of a specific legal definition.

Such broad and cross cutting definitions enable prosecutors to charge perpetrators of crimes of sexual violence with the cumulative offences of torture (as a crime against humanity or a war crime), and rape or other sexual violence (such as enslavement and sexual slavery) as prohibited under the Rome Statute.⁷³ The broad definitions contained in the Statute have opened the door to the possibility of wider prosecutions of international crimes of sexual violence, and as such, the ICC has been heralded as marking ‘a new era of international justice and accountability for women.’⁷⁴ Clearly, the

⁷⁰ *Rome Statute* Supra note 59 at Article 7(2)(c).

⁷¹ See ICC Elements of Crimes at Article 7(1)(f).

⁷² Ibid.

⁷³ On cumulation of offences generally, see Susanne Walther ‘Cumulation of offences’ in A Cassese et al (eds) *The Rome Statute of the International Criminal Court: A Commentary – Volume I* (2002) 475-95.

⁷⁴ Rehn and Johnson-Sirleaf Supra note 12 at 93.

exhaustive list of sexual violence crimes provided for in the Rome Statute represents an important step forward for the prosecution of crimes of sexual violence.⁷⁵

II.4.4 Procedural Developments

In addition to the substantial provisions listed above, the statute also provides for procedural safeguards aimed specifically at prosecution of crimes of sexual and gender-based violence. The Statute recognizes that in order to ensure justice is realized, the composition of the court must be taken into account, and special measures must be instituted to provide for victims and/or witnesses. Although, all the statutes of international courts and tribunals contain provisions regarding the composition of the bench, Article 36 of the Rome Statute, which deals with the qualifications, nomination and election of judges, sets out further requirements, not previously seen.⁷⁶ In other international criminal tribunals, it is not a requirement for the judges to have actual experience in criminal law. The Rome Statute, however, requires that all judges have courtroom experience in criminal law and procedure.⁷⁷ Moreover, the statute stipulates that in the selection of judges, States parties shall take into account the need for representation of the principle legal systems of the world, equitable geographical representation, and an appropriate gender balance.⁷⁸ Even more significantly, in terms of dealing with crimes of sexual violence, the statute requires that judges have legal expertise on specific issues, including violence against women and children.⁷⁹ The significance of such provisions reflects the fact that '[w]ho interprets the law is at least as important as who makes the law, if not more so'⁸⁰—a concept that will be explored further in Chapter IV in the context of the ICTR. Article 36 represents a development in the international legal arena towards an understanding the crimes of sexual and gender-

⁷⁵ The substantive and procedural provisions that are specific to gender issues in the Rome Statute are as follows: Articles 7(1)(g), 7(1)(h), 7(2)(c), 7(2)(f), 7(2)(g), 7(3), 8(2)(b)(xxii), 8(2)(e)(vi), 21(3), 36(8)(a)(iii), 36(8)(b), 42(9), 43(6), 54(1)(b), 54(2), 57(3)(c), 68, and 69(4).

⁷⁶ Booth and Du Plessis *Supra* note 20 at 246.

⁷⁷ *Rome Statute Supra* note 59 at Article 36(5)

⁷⁸ *Ibid.*, at Article 36(8)(a).

⁷⁹ *Ibid.*, at Article 36(8)(b).

⁸⁰ Cited in Barbara Bedont and Katherine Hall Martinez 'Ending Impunity for Gender Crimes under the International Criminal Court' *Brown Journal of World Affairs* (1999) 6(1): 65-85 at 76.

based violence require illustrates the statute's commitment to ensure crimes of sexual violence are effectively prosecuted.

In addition to the provision concerning the composition of the bench, the Rome Statute's rules of procedure guarantee witness protection for women who testify. Under Article 68(2) the Court may, as an exception to the principle of public hearings laid down in the statute, conduct closed hearings or allow the presentation of evidence by electronic or other means in order to protect victims or witnesses. Furthermore, a Victim and Witnesses Unit (VWU) within the ICC may advise the prosecutor and the Court on appropriate protective measures, security arrangements, counselling and assistance.⁸¹ The VWU calls explicitly for staff 'with expertise in trauma, including trauma related to crimes of sexual violence.'⁸² Moreover, in a significant advancement, victims may receive reparations through compensation, restitution and rehabilitation, which may take the form of communal reconstruction and healing programs.⁸³ Finally, the ICC has gone another step further by providing for a Trust Fund for Victims, as per Article 79. This is particularly relevant for those victims of sexual violence who continue to live with the psychological and physical scars and illnesses incurred through rape and other forms of sexual violence. The existence of this provision is evidence of the recognition that in order for justice to be served, it is not enough simply to prosecute perpetrators of these gross violations of human rights. A Trust Fund could mean relative independence for a woman who has been left widowed and it could help provide for anti-retroviral drugs for those infected with HIV/AIDS as a consequence of rape. These procedural provisions recognize the multifaceted and continuous effects of crimes of conflict-related sexual and gender-based violence, and establish the obligation of the court to take victims' rights into account.

The significance of these developments is that the crimes recognized by the ICC Statute, including the gender-specific offences, might 'take on a life of their own as an authoritative and largely customary Statement of international humanitarian and criminal

⁸¹ *Rome Statute Supra* note 59 at Article 68(4).

⁸² Rehn and Johnson-Sirleaf *Supra* note 12 at 93.

⁸³ *Rome Statute Supra* note 59 at Article 75.

law, and ... become a model for national laws to be enforced under the principle of universality of jurisdiction.’⁸⁴ The Rome Statute embodies the progress made over the past five decades in terms of achieving gender justice, and provides the opportunity for the ICC to make a significant contribution to further jurisprudential development. The Statute has incorporated developments made by the ad-hoc tribunals and—in terms of crimes of sexual and gender-based violence—has set a precedent for subsequent international mechanisms.

II.5 Recent Developments: The Special Court for Sierra Leone, A Hybrid Court

In addition to the above statutory and jurisprudential developments, the United Nations Security Council Resolution 1325 (2000) recently demonstrated the international community’s resolve to strengthen mechanisms at both the national and international levels in order to end impunity for crimes of sexual violence.⁸⁵ The cumulative effects of these developments is that rape and sexual violence have finally been recognized as ‘weapons of war’ and not as private matters or as a question of personal or State honour. Such crimes, therefore, can no longer be considered as by-products of conflict. The brutally violent, widespread, and systematic acts of rape and sexual violence so central to campaigns of ethnic cleansing and genocide in recent years have effectively put an end to the privatisation of sexual violence, thrusting it into the public sphere.⁸⁶ The legal developments discussed above demonstrate not only an acknowledgment both nationally and internationally of crimes of sexual violence, but also a general willingness to address such crimes in the legal arena.

Furthermore, additional transitional justice mechanisms have been created inspired by and based upon the developments made by the ad-hoc tribunals and by the International Criminal Court. Following along the path already forged by the ad hoc tribunals,

⁸⁴ Theodor Meron, ‘Crimes under the jurisdiction of the international criminal court’ in Herman A. M. von Hebel, Johan G. Lammers and Jolien Schukking (eds.) *Reflections on the International Criminal Court* (1999) 47-48.

⁸⁵ United Nations Security Council Resolution 1325 (2000). S/RES/1325 (2000) Available at <http://www.peacewomen.org/un/sc/1325.html> [Accessed 12 September 2006].

⁸⁶ Copelon *Supra* note 16 at 221.

internationalised or “hybrid”⁸⁷ courts have been jointly established over the years by the United Nations and national transitional governments in order to deal with specific conflict situations. These courts are essentially custom-made to suit each country’s particular post-conflict circumstances and include the Crimes Panels of the District Court of Dili in East Timor, the “Regulation 64” Panels in the Courts of Kosovo, and the Special Court for Sierra Leone. As with the ad hoc tribunals, the aim of these hybrid courts is to impose punitive sanctions on individuals who have violated international law and to contribute to the restoration of peace and stability in the countries and regions affected. What sets this type of internationalised criminal court apart from the other mechanisms discussed above is the fact that it applies both international and domestic substantive and procedural law, which is reflected in its unique legal features.⁸⁸ Unlike the ad-hoc tribunals, therefore, these courts do not take precedence over the domestic courts of States in which they are established. This fact is of key significance when establishing the connection between international and domestic law, particularly in the context of implementation.

The Special Court for Sierra Leone (‘Special Court’), for example, was created in the aftermath of the protracted civil war that took place in Sierra Leone from 1991-2001, resulting in tens of thousands of deaths and the displacement of more than 2 million people (well over one-third of the population) many of whom became refugees in neighbouring countries.⁸⁹ The Special Court was established by an agreement between the United Nations and the Government of Sierra Leone pursuant to Security Council Resolution 1315 (2000) of August 14, 2000. Its mandate is to prosecute persons who bear the greatest responsibility for serious violations of international humanitarian law and Sierra Leonean law committed in the territory of Sierra Leone since 30 November 1996. Such persons include those leaders who, in committing such crimes, threatened the establishment and implementation of the peace process in Sierra Leone.⁹⁰ In addition the

⁸⁷ PICT *Supra* note 13.

⁸⁸ See *Ibid* at 13.

⁸⁹ *Ibid.*, See also the Official Website of the Special Court for Sierra Leone. Available at www.sc-sl.org [Accessed on 31 August 2006].

⁹⁰ Statute of the Special Court for Sierra Leone, (2000) at Article 1(1). Available at <http://www.sc-sl.org/scsl-statute.html> (accessed on August 29 2006). [Hereafter, Special Court Statute]

Special Court has competence to prosecute any transgressions by peacekeepers and related personnel.⁹¹

Pursuant to the advancements made by both the ad-hoc tribunals and the Rome Statute, the Special Court Statute also specifically provides for crimes of sexual and gender-based violence. Included in the Special Court's Statute's definition of crimes against humanity are 'rape, sexual slavery, enforced prostitution, forced pregnancy and any other form of sexual violence' when committed 'as part of a widespread or systematic attack' against civilians.⁹² In addition, crimes of sexual violence that constitute war crimes include 'rape, enforced prostitution and any form of indecent assault.'⁹³ Illustrative of its hybrid nature, the Statute also gives the Court the mandate to prosecute crimes that fall under Sierra Leonean law, including 'offences relating to the abuse of girls under the Prevention of Cruelty to Children Act, 1926.'⁹⁴

In terms of procedure, the Statute follows the example of the Rome Statute by providing for the engendering of the investigation and prosecution phases of crimes of sexual violence. Article 15 (4) provides that given 'the nature of the crimes committed and the particular sensitivities of girls, young women, and children [sic] victims of rape, sexual assault, abduction and slavery of all kinds, due consideration should be given in the appointment of staff to the employment of prosecutors and investigators experienced in gender-related crimes and juvenile justice.'⁹⁵ In a similar vein, Article 16 (4) requires that the staff within the Victims and Witnesses Unit of the court 'include experts in trauma, including trauma related to crimes of sexual violence and violence against children.'⁹⁶

II.6 Conclusion

The developments outlined in this chapter illustrate the efforts that have been made at the international level to establish criminal responsibility for acts of sexual and gender-based

⁹¹ Ibid., at Art 1(2).

⁹² Ibid., at Article 2.

⁹³ Ibid., at Article 3.

⁹⁴ Ibid., at 5(a).

⁹⁵ Ibid., at 15(4).

⁹⁶ Ibid., at 16(4).

violence during conflict, whether internal or international. Consequently, the general outcome of these developments is that such crimes are no longer considered invisible in the legal sphere, and are in fact treated with the same magnitude as other gross human rights violations enshrined in international law. The significance of these developments cannot be emphasized enough, for they have created a space for sexual and gender-based violence within the international legal sphere, thereby consolidating the status of such acts as violations of international human rights law. However, the establishment of such laws and mechanisms do not necessarily ensure that crimes of sexual and gender-based violence are effectively dealt with. In fact, the full impact of these developments can only truly be judged in the context of the implementation process at the domestic level. The mechanisms and laws described above, therefore, are essentially ineffective without an appropriate approach to implementation that ensures the realization and sustainability of the principles enshrined in their statutes and reflected in their jurisprudence. This is particularly significant in the context of transitional societies emerging from conflicts characterized by gross human rights violations, particularly sexual and gender-based violence. The following chapter will outline and analyse transitional justice theories and models of both retributive and restorative justice, and will propose that any strategy employed by a State in transition, must include elements of both models of transitional justice, and must take into account the specific circumstances of its society in order to be truly effective.

III Transitional Justice Models: Theory and Mechanisms

III.1 Introduction

The key statutory and jurisprudential developments outlined in Chapter II provide the international legal context within which crimes of sexual and gender-based violence can be addressed. These developments, however, are essentially rendered ineffectual if there are no proper mechanisms in place with which to implement them. In the case of transitional societies, the challenge facing each State is how to incorporate developments made at the international level into domestic law. Conflict situations tend to be characterized by lack of rule of law and a culture of impunity. This is evident in countries like Rwanda and Sierra Leone, where the crimes committed against women and girls were so rampant, systematic, and widespread. The present chapter examines the possible approaches transitional societies can take to implement the legal developments discussed in the previous chapter. It sets out the principles of transitional justice and outlines the theoretical debate concerning whether or not a strictly retributive or a strictly restorative approach to transitional justice is most effective. The chapter will establish that there are significant limitations to employing a purely retributive or a purely restorative approach to transitional justice in post-conflict societies. As such, a country must employ a comprehensive model of transitional justice that incorporates key aspects of both restorative and retributive justice, bridges the gap between international and domestic law, and takes into consideration the specific circumstances of the post-conflict society in question.

III.2 What is Transitional Justice?

In international law, the field of transitional justice addresses the effects of conflict in post-conflict or transitional societies in order to create sustainable peace and to prevent future conflict.⁹⁷ Essentially, ‘transitional justice refers to the short-term and often temporary judicial and non-judicial mechanisms and processes that address the legacy of

⁹⁷ Sarkin *Supra* note 15 at 175

human rights abuses and violence during a society's transition away from conflict....'⁹⁸
 The brand of justice to be applied in a post-conflict society is especially relevant in the context of societies where gross violations of human rights have been committed on a massive scale, not only by authority figures, but also by members of the community at large. Relying primarily on ensuring the human rights of victims, transitional justice basically entails confronting the past in order to reconstruct the present and fortify the future. It

...relies on international law to make the case that States undergoing transitions are faced with certain legal obligations, including halting ongoing human rights abuses, investigating past crimes, identifying those responsible for human rights violations, imposing sanctions on those responsible, providing reparations to victims, preventing future abuses, preserving and enhancing peace, and fostering individual and national reconciliation.⁹⁹

Transitional justice, therefore, embodies a State's attempts to achieve both justice and reconciliation within a society that is in a continuous State of recovery, while simultaneously repairing the fragmented social and institutional fabric.

It can be argued that the values of justice and reconciliation appear to be diametrically opposed,¹⁰⁰ since the pursuit of one may, in some cases, inherently contradict the pursuit of the other. Justice and reconciliation, however, are both continual processes with the mutual goal of identifying the tears in the societal fabric that have been caused by crimes committed during and in the aftermath of conflict situations, and of further identifying (or in some cases, creating) the appropriate mechanisms with which to mend these tears, and restore the society to one that is able to prevent future conflict and effect reconciliation. The goals of transitional justice include:

- addressing, and attempting to heal, divisions in society that arise as a result of human rights violations;
- bringing closure and healing the wounds of individuals and society, particularly through 'truth telling';

⁹⁸ Sanam Naraghi Anderlini, Camille Pampell Conaway and Lisa Kays, 'Transitional justice and reconciliation.' (2004). Available at www.womenwagingpeace.net/content/toolkit/chapters/Transitional_Justice.pdf. [Accessed 25 October 2006].

⁹⁹ Louis Bickford 'Transitional justice' in *Genocide and Crimes against Humanity* (2004):1045 at 1046.

¹⁰⁰ Anderlini et al *Supra* note 98 at 1.

- providing justice to victims and accountability for perpetrators;
- creating an accurate historical record for society;
- restoring the rule of law;
- reforming institutions to promote democratisation and human rights;
- ensuring that human rights violations are not repeated; and
- promoting co-existence and sustainable peace.¹⁰¹

The ultimate goal of transitional justice, therefore, is the realization of national and societal reconciliation through justice. In attempting to heal the wounds of conflict, justice and reconciliation are inextricably intertwined. Since reconciliation is a process, it can refer to anything from peaceful co-existence to dialogue, apology and forgiveness and, subsequently, healing.¹⁰² The point of reconciliation is not to restore the situation to what it once was, but rather to reconstruct societies through achieving the goals such as those listed above. Reconciliation, therefore, is not an end result, as much as it is a continual process involving both judicial and extra-judicial mechanisms and efforts. How a post-conflict country chooses to embark on this process depends largely on the type of conflict from which it is emerging. As such, countries ‘make their choices according to the contexts of their transitions, taking into account the seriousness of the crimes committed and the resources available to deal with these issues.’¹⁰³ Sarkin maintains that:

Broadly speaking, options available to a new democratic society include (1) criminal sanctions; (2) non-criminal sanctions; and (3) the rehabilitation of the society. Usually, the path chosen takes into account three goals: truth, justice, and reconciliation. The balance struck between these goals is determined to a large extent by the type of transition.¹⁰⁴

Essentially, therefore, the path to reconciliation and societal reconstruction is unique to each post-conflict society, depending on numerous contributing factors.

Within the field of transitional justice, questions are raised as to whether justice should be retributive or restorative in nature; whether, for example, transitional societies should focus on conducting individual prosecutions, establishing truth and reconciliation

¹⁰¹ Ibid.

¹⁰² Ibid., at 2.

¹⁰³ Sarkin *Supra* note 15 at 145.

¹⁰⁴ Ibid. at 146-47.

commissions, or utilizing traditional courts. The challenge facing transitional governments is that they ‘must think creatively about building institutions that bring justice to the past, while at the same time demonstrate a commitment that justice will form a bedrock of governance in the present and the future.’¹⁰⁵ In a transitional society emerging out of mass violence, therefore, justice represents a ‘path between too much memory and too much forgetting.’¹⁰⁶ It is imperative to retain the memory of conflict through acknowledgement of the atrocities that were committed. Similarly, it is imperative to institute measures that address such atrocities in a manner that ensures they can never again occur.

III.3 Retributive Justice Model

One of the first instances of transitional justice at work were the Nuremburg trials that took place after the Second World War, and were rooted in the justice paradigm¹⁰⁷—in which individuals were identified and prosecuted according to international law. The aim of ‘retributive justice’ is to establish individual criminal responsibility through prosecution. The key underlying principle of retributive justice is that an individual who commits violations of human rights should be sufficiently punished in a court of law, or at the very least be made to confess in a public forum and seek forgiveness.¹⁰⁸ This is based on the Kantian notion of *just desert*, which posits that, in every society, each individual enjoys the benefits of rule of law. When an offender commits a wrongdoing, they deprive the victim(s) of their benefits while undeservedly gaining their own benefits.¹⁰⁹ Punishment, therefore, ‘removes the underserved benefit by imposing a penalty that in some sense balances the harm inflicted by the offense [sic].’¹¹⁰ It is hoped that through criminal prosecution, future violations may be deterred and justice will be

¹⁰⁵ Katherine Franke ‘Gendered subjects of transitional justice’ *Columbia Journal of Gender Law* (2005) 15(3): 813 at 813.

¹⁰⁶ Martha Minow, *Between vengeance and forgiveness: facing history after genocide and mass violence* (1998) 2.

¹⁰⁷ Aneta Wierzyńska, “Consolidating Democracy through Transitional Justice: Rwanda’s Gacaca Courts”, *NYU Law Review* 79 (2004): 1945.

¹⁰⁸ Anderlini et al *Supra* note 98 at 2.

¹⁰⁹ Michelle Maiese ‘Retributive justice’ in. Guy Burgess and Heidi Burgess (eds) *Beyond intractability* (2004). Available at http://www.beyondintractability.org/essay/retributive_justice/ [Accessed on 09 November 2006].

¹¹⁰ Wesley Cragg *The practice of punishment: towards a theory of restorative justice* (1992) at 15.

realized for the victims of these violations.¹¹¹ Advocates of the retributive approach believe, therefore, that punishment is necessary to establish accountability, to act as a deterrent to future crimes, to ensure resistance to a culture of impunity, and to enable future co-existence of perpetrators and victims. A final element of the retributive justice model is restitution, which ensures either recovery of losses or compensation for the victims. This usually takes the form of monetary compensation to the victims either by the offender or on behalf of the State.¹¹²

Proponents of prosecution feel that it is a necessary route to ensure social reconciliation, because ‘society cannot forgive what it cannot punish.’¹¹³ By singling out and punishing perpetrators of human rights violations, culpability is individualized, thereby preventing the targeting and scapegoating of a particular group. This is particularly significant in post-conflict societies in which one group (ethnic, religious, or otherwise) has been the subject of persecution at the hands of another. Proponents of the retributive justice model maintain that individual prosecutions serve to demonstrate to the society at large that the legal and political systems in place are indeed functional and efficient, thereby restoring faith in the administrative and judicial systems.¹¹⁴ Diane Orentlicher maintains that prosecutions are a must in transitional justice because international law imposes an obligation on governments to prosecute a prior regime’s human rights violations, arguing that prosecutions are the most effective way with which to address past atrocities.¹¹⁵ Other proponents of retributive justice posit that ‘prosecution makes possible the sort of retribution seen by most societies as an appropriate communal response to criminal conduct.’¹¹⁶ While containing elements of both justice and reconciliation, retributive justice tends to place the emphasis more on the former than the latter. In this sense, the retributive model looks less towards the future, and instead, retrospectively examines the

¹¹¹ Sarkin *Supra* 15 at 147.

¹¹² Anderlini et al *Supra* note 98 at 2.

¹¹³ Stephen Landsman ‘Alternative responses to serious human rights abuses: of prosecutions and truth commissions’ *Law and Contemporary Problems* (1996) 59: 81 at 84.

¹¹⁴ *Ibid.*

¹¹⁵ Diane Orentlicher ‘Settling Accounts: the duty to prosecute human rights violations of a prior regime,’ *Yale Law Journal* (1990) 100: 2537

¹¹⁶ Landsman *Supra* note 113.

crime that was committed and focuses on how that crime should be punished and how victims and society in general benefit from said punishment.

The primary vehicles for the retributive justice model are domestic courts. In the aftermath of mass atrocities, however, domestic courts are often overwhelmed and unable to withstand the caseload due to lack of infrastructure and/or human resources. As such, numerous international mechanisms of transitional justice have emerged over the years at the international level, such as the ad-hoc tribunals, the International Criminal Court, and the specialized hybrid courts, as discussed in the previous chapter.

A purely retributive model, however, faces several limitations. Inherently, retributive theory views punishment as a debt owed by the offender to the State and society, but not necessarily to the victim. In fact, ‘sentencing is proportional to the definition of the act—not the degree to which the victim was hurt. That is, the punishment is matched to the crime, not to the effects of the crime.’¹¹⁷ This is of particular significance in the context of sexual and gender-based violence, where the crimes committed give rise to a myriad of psychological and physical effects that must be addressed in order for justice to be fully realized. In a study carried out by Regher and Allagia about justice for victims of sexual violence, a judge stated the following:

It is important that people understand the limits of the justice system in actually dealing with some of the fundamental psychological effects of victimization . . . the justice system is not set up to deal with emotional traumas that result from victimization.¹¹⁸

This reflects the fact that the retributive approach to transitional justice inherently conflicts with the ingredients necessary for reconciliation, which is the aim of any transitional justice process.

Detractors of the retributive justice model point out that the focus on the perpetrator that is characteristic of individual trials does not allow for much, if any, attention to be paid to

¹¹⁷ Cheryl Regher and Ramona Alaggia ‘Perspectives of justice for victims of sexual violence’ *Victims & offenders* 1 (2006) 1: 33 at 37.

¹¹⁸ Ibid. at 43

the victims and to their healing process. Firstly, the question arises as to whether the retributive justice model is appropriate for dealing with gross human rights violations on a massive scale. For example, while criminal trials may be adequate for addressing crimes of homicide or rape, in general, does this translate to situations wherein these crimes are widespread and systematic and where victims number by the hundreds of thousands? Simply because prosecution is the routine response to ordinary criminal activity, is it an ‘appropriate analogy for mass human rights atrocities’ in which victims number by the hundreds or thousands?¹¹⁹ Secondly, within the judicial process, particularly one involving gross violations of human rights, the chance of re-victimization is increased ‘as those giving testimony are cross examined in a potentially hostile and humiliating proceeding.’¹²⁰ This is reflective of the victim’s tertiary role in classic trials. Regher and Allagia’s study notes that from the purely legal point of view, ‘the goal of the criminal justice system is to determine whether a crime has been committed whereby the outcome of a finding of guilt will result in the loss of liberty of the accused individual.’¹²¹ The focus, therefore, is not on the rights of the victim(s), but ‘on the rights of the accused to a fair trial.’¹²²

Another noteworthy limitation to the retributive approach is the fact that the adversarial nature of a criminal trial does not necessarily ensure that whole truths are revealed.¹²³ A central part of the justice process for victims is getting their stories heard. Particularly in cases of sexual and gender-based violence—crimes that are usually shrouded in silence—it is crucial that women and girls are provided with a forum in which to tell their stories. As Franke notes, however, ‘this kind of truth-telling is not within the jurisdiction of formal legal fora. The translation of human suffering into a vocabulary and a form that is acceptable and appropriate to a judicial proceeding can be a dehumanising experience, not only for victims of sexual violence, but *particularly* for them [emphasis added].’¹²⁴ The potential for re-victimization and dehumanisation of victims is very real not only

¹¹⁹ Miriam Auckerman ‘Extraordinary evil, ordinary crime: a framework for understanding transitional justice’ *Harvard Human Rights Journal* (2002) 15: 39 at 41.

¹²⁰ Landsman *Supra* note 113.

¹²¹ Regher and Allagian *Supra* note 117 at 37.

¹²² *Ibid.*

¹²³ *Ibid.*

¹²⁴ Franke *Supra* note 105 at 5.

during the trial process in which victims are witnesses, but also to the crime investigation process. In fact, '[i]f gender-based crimes are to be prosecuted, they need to be investigated and indicted according to international standards, and the investigators and prosecutors need to be trained in gender crimes and sensitive to the needs of the victims.'¹²⁵ A significant limitation to the retributive approach is the rather inhospitable atmosphere victims tend to face, given their tertiary role in the judicial process. For example, '[w]hen a doctor assigned to victims testifying before the ICTY proposed that they be provided with psychological support during the testimony, the initial response was that the Tribunal was "not engaged in 'social work,' but important legal proceedings.'" This perspective results in victims being regarded merely as sources of information, rather than as stakeholders in the process. Finally, the retributive approach can be inherently challenged by the fact that post-conflict societies often find 'their adjudicatory mechanisms too weak, unskilled, biased, or corrupt to carry out the difficult task of overseeing fair and expeditious trials.'¹²⁶ This type of atmosphere renders States unable to effectively investigate and prosecute gross violations of human rights and this, therefore, may inevitably result in miscarriage of justice.

Given all of the above, it is difficult to see how justice is realized in the retributive context, particularly for victims. Furthermore, it is even more difficult to identify a path to reconciliation within such a context. In transitional societies, therefore, where society has been fragmented by gross violations of human rights, and where States face the enormous task of rebuilding judicial systems that have collapsed during conflict, it is imperative to recognize the need to seek an alternative to a purely retributive approach to that there may be more than one route to realizing justice and reconciliation.

III.4 Restorative Justice Model

As opposed to retributive justice, restorative justice focuses on victims as well as on perpetrators, and seeks to engage the society in a dialogue that includes elements of truth-telling, apology, and forgiveness, and that ultimately leads to reconciliation. Restorative

¹²⁵ Rehn and Johnson-Sirleaf *Supra* note 12 at 95.

¹²⁶ Landsman *Supra* note 113 at 85

justice is defined as ‘societal healing of damages resulting from past crimes.’¹²⁷ This theory informs mechanisms such as Truth and Reconciliation Commissions and it ‘step[s] beyond the retributive strategy—and even the justice paradigm—towards an evolving understanding that any dealings with the past should focus on impacting the future of the post conflict society constructively. This constructive, forward-looking approach aligns transitional justice more closely with its preventative mission.’¹²⁸ The first instances of the restorative justice model were the Truth Commissions established in Latin America in the aftermath of brutal dictatorial regimes, such as Argentina’s National Commission on the Disappeared, created in 1983. These transitional justice mechanisms were established ‘as a way to strengthen new democracies and comply with the moral and legal obligations that the human rights movement was articulating, both domestically and internationally.’¹²⁹

The goals of restorative justice include addressing the root causes of the conflict, involving all stakeholders in the restoration process,¹³⁰ emphasizing the importance of truth telling, apologizing and seeking forgiveness, and preventing future conflicts through measures instituted to rebuild the affected societies/communities. This community-based model of justice focuses on bringing perpetrators and victims together and—as with retributive justice—ensuring restitution to the victims. Of particular relevance to victims of sexual and gender-based violence is the fact that truth commissions tend to take the focus away from the accused and focus, instead, on the victims. This communal, victim-centric atmosphere ‘provid[es] victims and survivors with a supportive context in which to recount their story [and] some victims find [the experience to be] an important part of the healing process.’¹³¹

Furthermore, despite the fact that restorative justice mechanisms are limited in terms of legal powers, their focus on the various multidimensional factors that contribute to

¹²⁷ Weinstein and Stover *Supra* note 9 at 14.

¹²⁸ Wierzyńska *Supra* note 107 at 1946.

¹²⁹ Bickford *Supra* note 99.

¹³⁰ John Braithwaite ‘Restorative justice: assessing optimistic and pessimistic accounts’ *Crime and Justice: A Review of Research* (1999) 25: 1 at 5.

¹³¹ Priscilla Hayner ‘Truth Commissions’ in Dinah L. Shelton and Thomson Gale (eds.) *Genocide and Crimes Against Humanity* (2005).

conflict affords them the opportunity to have more of a significant impact in terms of reconstructing post-conflict societies. For example, as Priscilla Haynes argues, '[s]ince [restorative justice mechanisms] are not limited to the individualized facts of a set of prosecutions, they can marshal and disseminate all the relevant facts about an oppressive regime. The record a truth commission can develop is the most powerful tool available to inoculate a society against dictatorial methods.'¹³² As established above, retributive mechanisms provide for truth-telling only in a limited sense—victims' testimonies are legally relevant only in the sense that they provide information necessary only to prosecuting or defending the accused. The truth-telling function of truth and reconciliation commissions, however, is 'able to develop a more comprehensive record and understanding of the full scale of violations.'¹³³ This notion of more comprehensive truth-telling within a communal setting is what most definitively sets restorative justice mechanisms such as these apart from retributive justice mechanisms.

Despite the common underlying values of justice and reconciliation, therefore, the key difference between the retributive and the restorative justice models is the fact that while the former focuses on punitive measures aimed at the individual perpetrator, the latter focuses on collective efforts to deal with the consequences of the crimes committed and to ensure reparation of the subsequent damage. While non-judicial mechanisms such as truth commissions are unable to prosecute crimes of international human rights law, their proponents argue that they serve a crucial complementary role in the transitional justice process. In her discussions on truth commissions established over the last 20 years, Priscilla Hayner States that '[i]f you look at the experience of countries in the past, and the impact that information from truth commissions has had in feeding into prosecutions that followed, I think we can argue very strongly that truth commissions are complementary and even strengthen prosecutions.'¹³⁴ This complementary nature can also be attributed to alternative restorative justice mechanisms such as traditional

¹³² Landsman *Supra* note 113 at 88.

¹³³ Rehn and Johnson-Sirleaf *Supra* note 12 at 99.

¹³⁴ Priscilla Hayner 'Truth Commissions' Paper presented at the conference on 'Truth, Justice, Accountability and Reconciliation in Societies Emerging from Crimes Against Humanity', Peter Wall Institute of Advanced Studies at the University of British Columbia, October 2000. Available at <http://www.ictj.com> [Accessed on 7 September 2006].

tribunals, which ‘often involve religious leaders, village elders and local officials in resolving domestic or communal conflicts, including rape and domestic violence.’¹³⁵ Such mechanisms are often employed when the legal system becomes overburdened and unable to withstand the existing caseload. An example of such national mechanisms of transitional justice is the *gacaca* court system established in Rwanda in 2001 to address genocide crimes.

This system was established as an alternative to the national courts, which were overwhelmed by the sheer volume of cases with which it was faced. The *gacaca* tribunals provide a forum within which the accused is given the opportunity either to confess or to answer to the charges against him/her and to provide his/her own account. Members of the panel of judges are given the opportunity to question both the accused and the general assembly; and the members of community are given the opportunity to provide testimony and to seek answers from the accused.¹³⁶ An advantage of these courts is not only their ability to offer an alternative route to justice, but also to ‘offer familiarity and legitimacy to the population [thereby contributing] to reconciliation and reconstruction.’¹³⁷ As is the case with truth commissions, the role of local or traditional courts is complementary and is meant to work in cooperation with other mechanisms within the transitional justice sphere. Restorative justice, therefore, differs from retributive justice in the sense that it provides for the building of a foundation for future reconciliation and for restoration of societies fragmented by conflict. Standing alone, however, such restorative mechanisms face significant limitations in terms of attaining the goals of transitional justice.

In the context of crimes of sexual and gender-based violence in particular, limitations of restorative mechanisms include; the use of a non-judicial forum to address violations of international human rights law; the exclusion of such crimes in the mandates and procedural measures of restorative mechanisms; and the lack of privacy and protection due to the public nature of these communal mechanisms. The non-judicial nature of the

¹³⁵ Rehn and Johnson-Sirleaf *Supra* note 12 at 100.

¹³⁶ Official Website of the Inkiko Gacaca, ‘Overview.’ Available at [http://www.inkiko-gacaca.gov.rw/En/En Introduction.htm](http://www.inkiko-gacaca.gov.rw/En/En%20Introduction.htm) [Accessed on April 21 2006].

¹³⁷ Anderlini et al *Supra* note 98 at 7.

restorative approach means that crimes of sexual and gender-based violence cannot be dealt with in accordance with international law. One key shortcoming to utilizing the restorative justice approach is the obvious: how can a State ensure the eradication of a culture of impunity without imposing sanctions for the crimes that have been committed? The very nature of truth commissions, for example, entails that '[they] cannot match prosecutions with respect to the fulfilment of the important policy goals regarding punishment.'¹³⁸ While the community-based approach does have its merits in the sense that it provides a forum for dialogue between perpetrators and victims, is justice truly achieved if those who wilfully carried out programs of torture, murder, mutilation, and slavery are granted amnesty? Aneta Wierzyńska argues that restorative justice mechanisms 'tie stakeholders...into a system of mutual accountability.'¹³⁹ Does this mutual accountability not then take away from the importance of establishing individual criminal accountability so central to the maintenance of and adherence to international human rights law? This issue is of particular significance when it comes to addressing gross violation of human rights that have been committed on a massive scale. Since one of the goals of transitional justice is to ensure the prevention of future violations, it is difficult to see how that can be achieved if emphasis is placed solely on discovery and dissemination of truth, rather than on punitive measures.

Another challenge to the restorative justice model in the context of sexual and gender-based violence is the exclusion of such crimes in the process, and the subordinate status accorded to such crimes in comparison to other gross violations of human rights. In order for restorative justice mechanisms to effectively deal with crimes of sexual and gender-based violence, these crimes must be included in the specific mandate establishing the mechanism. In addition, they must be treated with equal gravity as other crimes against humanity. As established in Chapter II, before the landmark developments made by the ad-hoc tribunals, sexual and gender-based violence remained firmly on the fringes of the international legal sphere. This was somewhat reflected in the mandates and reports of various Truth Commissions, such as the Salvadoran Commission on Truth (1993), whose

¹³⁸ Landsman *Supra* note 113 at 88.

¹³⁹ Wierzyńska *Supra* note 107 at 1962.

report excluded testimony of rape and sexual violence because they fell outside a mandate that was limited to ‘politically motivated acts.’¹⁴⁰ In some cases, Truth Commission Reports included sexual violence, but only inasmuch as it constituted torture.¹⁴¹ In 1995, the South African Truth & Reconciliation Commission was established without the inclusion of crimes of sexual and gender-based violence. In fact, it was not until a study was conducted in 1996 highlighting the suppression of women’s perspectives in truth commissions over the previous 33 years¹⁴² that South Africa took steps to ensure:

- the inclusion of gender-based and sexual violence in the definition of gross human rights violations;
- changes to the Statement protocol to inform women of the importance of relating incidences during which they themselves were the victims; and
- the addition of special women-only hearings.¹⁴³

It is evident, therefore, that in the hands of restorative justice mechanisms, therefore, crimes of sexual and gender-based violence are susceptible to falling through the cracks of the transitional justice system unless they are specifically prioritized.

A final challenge facing the restorative model is the lack of participation of women in the process, whether as witnesses or as officials. Testimony regarding crimes directed specifically against women, including rape and sexual violence, is provided in truth commissions significantly less than testimony about other violations of human rights.¹⁴⁴ When women do come forward to provide testimony, experts note that they ‘downplay their own experiences and focus on crimes committed against their husbands, sons and families’ and even ‘crimes committed against other women.’¹⁴⁵ The general reluctance of women to divulge information concerning their own violations ‘is due in part to the stigma associated with reporting these crimes, in part to the lack of protection and

¹⁴⁰ Hayli Millar ‘Women and transitional justice: A preliminary assessment of women’s experiences with truth commissions’ in Helen Hurham and Tracey Gurd (eds) *Listening to the silences: Women and war*. (2004) at 18.

¹⁴¹ Anderlini et al *Supra* note 98 at 5.

¹⁴² South African Truth and Reconciliation Commission ‘South Africa: TRC and gender’ Truth and Reconciliation Commission Statement. 15 August 1996. Available at <http://www.africaaction.org/docs96/trc9608.htm> [Accessed on 4 October 2006].

¹⁴³ Anderlini et al *Supra* note 98 at 10.

¹⁴⁴ See Priscilla Hayner, *Unspeakable truths: Confronting State terror and atrocity* (2000).

¹⁴⁵ Rehn and Johnson-Sirleaf *Supra* note 12 at 99.

support for women survivors and in part to women's unfamiliarity with the processes.'¹⁴⁶ Many women and girls continue to carry not only the physical scars of rape and sexual violence, but also the psychological burden of being unable to disclose information on their assaults, lest they are ostracized.¹⁴⁷ Furthermore, all too often, the atmosphere of these mechanisms is not conducive to encouraging or facilitating the testimony of victims.¹⁴⁸ Restorative justice mechanisms cannot effectively address crimes of sexual and gender-based violence without ensuring the participation of women judges or commissioners; the institution of specialized mechanisms, such as providing the option of the provision of testimony in closed sessions (*in camera*); and the dissemination of information concerning the structure and procedure of these mechanisms. Without the above, these mechanisms run the risk of lacking legitimacy in the eyes of the transitional society for which they are established. And without this legitimacy, the sense of communal ownership so necessary for the success of restorative justice mechanisms is gravely compromised.

III.5 Comprehensive Model of Transitional Justice

The theoretical debate concerning whether or not retributive or restorative justice approaches are more successful is ongoing, and there are evidently numerous limitations to the use of either a strictly retributive or restorative approach. There exist numerous mechanisms of transitional justice at both the international and national level that fall into either the retributive or restoration models. What is evident from the different mechanisms utilized by both models of justice is that a) in the face of gross violations of human rights on such an enormous scale, no one mechanism will suffice; and b) the choice of which path to take to achieve justice and reconciliation is not based on theoretical debate, but on which path or paths best suit the needs of a particular society. The answer to all the open-ended questions raised by strict adherence to either model is that '[i]n most cases, justice demands the deployment of a number of these tools, given

¹⁴⁶ Ibid.

¹⁴⁷ See Sierra Leone Truth and Reconciliation Commission, 'Women and the armed conflict,' Truth and Reconciliation Commission Report Vol. 3B (2004) at 69. Available at <http://trcsierraleone.org/drwebsite/publish/v3b-c3.shtml> [Accessed on January 22 2007].

¹⁴⁸ Hayner *Supra* note 144 at 78.

that no one of them can adequately address and repair the injuries of the past nor chart a fully just future. Transitional justice will always be incomplete and messy.’¹⁴⁹

In which case, an effective transitional justice requires a multi-dimensional approach in order to achieve reconciliation and to prevent the recurrence of conflict. Post-conflict societies, therefore, must be willing to embrace an approach that combines both judicial and non-judicial processes aimed at addressing the past and preventing future conflict. Fletcher and Weinstein suggest an ‘ecological approach’ to social reconstruction that includes, in addition to justice, elements of democracy, economic prosperity and transformation, and reconciliation.¹⁵⁰ In the context of sexual and gender-based violence, this approach must take into account the specific physical, psychological, and socio-economic effects of such crimes, not only on society as a whole, but on the victims in particular. The ideal holistic and comprehensive approach, which will be explored further in a later chapter, would therefore include:

- Establishing individual criminal responsibility through prosecutions at the national and/or international level through national courts, ad-hoc tribunals, the International Criminal Court, or ‘hybrid’ internationalised courts.
- Establishing community-based mechanisms centred on truth-telling through confessions of perpetrators and testimony of victims and witnesses. These may or may not include the element of forgiveness.
- Undertaking the reform of archaic institutions and legislation that may have contributed to a culture of impunity and lack of respect for human rights and rule of law.
- Encouraging reconciliation through preservation of memory and initiation, and promotion of national dialogue, thereby discouraging a conspiracy of silence and eliminating the stigma surrounding sexual and gender-based violence.
- Establishing reparations for victims, including financial compensation and provision of healthcare and education.

III.6 Conclusion

From the above discussion thus far, it becomes clear that even with the consolidation of international legal protection for conflict-related crimes of sexual and gender-based

¹⁴⁹ Franke *Supra* note 105 at 813.

¹⁵⁰ Fletcher and Weinstein *Supra* note 8 at 623.

violence, each post-conflict society requires a model of transitional justice that ensures that these international developments are reflected in the domestic sphere. The present chapter has set out the theoretical discussion for and against the restorative and retributive models of transitional justice and has established that either approach faces considerable limitations when it comes to practical implementation. Whether utilizing international and/or national mechanisms, a society cannot rely on a single model to ensure justice and reconciliation. The next chapter will examine Rwanda's various mechanisms of transitional justice in order to illustrate examples of the limitations outlined in Chapter III, particularly in the context of crimes of sexual and gender-based violence. The aim of the chapter is to establish that in a society so fragmented by genocide and its aftermath that it has essentially had to be rebuilt, the pursuit of justice and reconciliation inevitably requires a multifaceted and continuous approach.

IV Challenges, Limitations and Barriers to Justice: The Rwandan Experience

IV.1 Introduction

The last few chapters have established that within the last decade, developments made in the arena of gender justice, though not yet adequate, have been significant indeed and have demonstrated a marked progress from antiquated notions of rape and sexual violence as crimes against honour to the institutionalisation of such acts as violations of international human rights law. Nevertheless, it remains to be seen whether this statutory and jurisprudential evolution at the international level translates into actual implementation of safeguards—legal or otherwise—that will ensure protection for past, present, and future victims of this violence. The true test of whether or not these developments are not merely symbolic, however, is whether or not they carry any actual weight in transitional societies. The previous chapter has established that each model of transitional justice—whether retributive or restorative—is hindered by various limitations and, as such, transitional societies must employ a comprehensive model of transitional justice, specific to their particular circumstances, that addresses the multifaceted effects of sexual and gender-based violence. This chapter aims to provide further insight into the challenges facing the transitional justice process by analysing the experience of post-genocide Rwanda in addressing crimes of sexual and gender-based violence.

In the aftermath of the genocide, the transitional mechanisms employed by Rwanda at both the national and international level have been tasked with dealing with overwhelming obstacles primarily due to the sheer volume of perpetrators and victims, and due to the effects on a society and State literally and figuratively torn apart by gross violations of human rights. This chapter will analyse Rwanda's retributive mechanisms of transitional justice (the ICTR and the national formal courts) and its largely restorative mechanism of transitional justice (the traditional *gacaca* courts) to demonstrate that the implementation process has been plagued by numerous substantial and procedural limitations which have effectively placed a myriad of obstacles in the path towards

justice and reconciliation for victims of sexual and gender-based violence specifically, and for Rwandan society in general.

IV.2 Rwanda's Retributive Justice Mechanisms

IV.2.1 The International Criminal Tribunal for Rwanda

As established in the previous chapter, transitional societies can employ retributive justice mechanisms at both the international and national levels. In Rwanda, the transitional government was confronted with innumerable obstacles in the process of attempting to rebuild a society shattered by the effects of genocide, and marked with a history of impunity and human rights abuses. In the spirit of retributive justice, the most significant and urgent legal issue in the aftermath of the genocide was the prosecution of the masterminds and ringleaders of the genocide, a task that fell largely under the jurisdiction of the ICTR. The ICTR's statutory and jurisprudential developments as regards sexual and gender-based violence are outlined in Chapter II and, in view of the precedents set in the *Akayesu* case, there is no longer a reason to exclude charges of rape and sexual violence from virtually every indictment brought before the Tribunal.¹⁵¹ Numerous scholars of gender justice, however, maintain that in light of the substantial and procedural anomalies that have characterized subsequent decisions and in light of the Tribunal's general approach to crimes of sexual and gender-based violence, *Akayesu* may well be the exception rather than the rule. Despite the momentous findings in *Akayesu*, the ICTR has been slow and ineffective in terms of investigating and prosecuting crimes of sexual violence. As Copelon argues, '[t]here is an apparent absence of both a clear policy that gender is a priority concern and of a gender expert, with oversight authority, on-site. Issues of witness protection, the gender-sensitivity of investigations, and community relations have been equally significant.'¹⁵² Some reasons given by international investigators and prosecutors as reasons not to pursue charges of rape and sexual violence at the ICTR are as follows: 'African women will not talk about rape;' 'We don't have the evidence;' 'Women's rights activists are trying to make the issue of rape more important than it should be;' and 'The rapes were a case of libido, not

¹⁵¹ Nowrojee *Supra* note 22 at 9.

¹⁵² Copelon *Supra* note 16 at 233.

genocide crimes.’¹⁵³ Unfortunately, the nature and origin of these statements serve to confirm the subordinate status generally afforded to crimes of sexual violence.

The viewpoints expressed in the above statements are also reflected in the actions and inactions of the tribunal. Indeed the ICTR has been plagued by shortcomings ranging from failure to incorporate charges of sexual violence in various cases to the maltreatment of victims/witnesses.¹⁵⁴ As a result, the gains made by the ad-hoc tribunals have been overshadowed by the severe limitations that have crippled the ICTR’s ability to effectively prosecute crimes of sexual violence. Generally speaking, survivors of the genocide are mistrustful and sceptical of the Tribunal, a fact compounded by the fact that the Tribunal is situated in Tanzania rather than in Rwanda.¹⁵⁵ The distance between survivors and the Tribunal is literal as well as figurative, as demonstrated by a 2003 study that examines in detail how victims of rape and sexual violence understand and perceive the ICTR.¹⁵⁶ The study categorizes survivors’ concerns into aspects of jurisprudence and aspects of justice. In terms of jurisprudence, Rwandan women are primarily concerned with public acknowledgement of the atrocities they endured and ‘want the record to show that they were subjected to horrific sexual violence at the hands of those who instigated and carried out the genocide.’¹⁵⁷ In other words, the jurisprudence of the tribunal must reflect the true nature and extent of the crimes committed. In terms of justice, women in Rwanda have significant concerns regarding the procedural aspects of the Tribunal’s handling of rape and sexual violence, essentially requiring a legal process ‘that treats rape survivors with the utmost respect and care at *all stages* of the process [emphasis added].’¹⁵⁸ Justice for victims therefore includes, but is not limited to, the manner in which the Tribunal treats them. This section will begin by examining the investigation

¹⁵³ Nowrojee *Supra* note 17.

¹⁵⁴ See HRW *Supra* note 4.

¹⁵⁵ This was one of the key objections registered by Rwanda when the ICTR was constituted in 1994. See Gerald Gahima ‘Re-establishing the rule of law and encouraging good governance’ Paper presented at the 55th Annual DPI/NGO Conference, New York, September 9, 2002), Website of the Rwandan Embassy to the United States; <http://rwandemb.org/prosecution/position.htm> [Accessed on May 5 2006].

¹⁵⁶ Nowrojee *Supra* note 22.

¹⁵⁷ *Ibid.*, at 4.

¹⁵⁸ *Ibid.*, at 4.

and prosecution processes of the ICTR in order to illustrate the ongoing challenges to jurisprudential development.

Regarding jurisprudence, the prosecution of crimes of rape and sexual violence is of vital importance because it provides an opportunity for victims' experiences to be recognized and to be reflected in the law. This issue is particularly urgent for survivors who are living with HIV/AIDS. According to one such survivor, without this aspect, '[f]or those of us on the road to death, this justice will be too slow...no one will know our story.... What happened to us will be buried with us.'¹⁵⁹ A simple case of justice delayed, therefore, is justice denied. The significance of retributive justice mechanisms such as international tribunals, therefore, is that they can provide public condemnation, which is a crucial aspect of the rebuilding process. Maintaining a public record is inherent in the ICTR's commitment to contribute to national reconciliation as stipulated in its mandate. It is therefore vital that the ICTR utilize its position to spotlight crimes of rape and sexual violence. Otherwise, as Nowrojee warns, with the jurisprudence as it currently stands, the ICTR is in danger of losing the legacy it was on the verge of creating with the *Akayesu* case.¹⁶⁰

IV.2.1.1 ICTR: Investigation and Prosecution

From the outset, charges of rape and sexual violence were not included in the Tribunal's initial indictments, including that of *Akayesu*, despite the fact that the crime of rape is provided for in the ICTR Statute as both a crime against humanity, as well as a war crime.¹⁶¹ At the time of *Akayesu*'s indictment, Human Rights Watch had released a report that focused, among other things, on rape and sexual violence in the Taba Commune, of which *Akayesu* was the *burgomestre*.¹⁶² The report noted the 'failure of the prosecutorial staff to take rape seriously, as well as the utter inappropriateness and lack of training of the investigative staff to undertake such an inquiry.'¹⁶³ Furthermore, Human Rights Watch reported that '[t]here is a widespread perception among the Tribunal

¹⁵⁹ *Ibid.*, at 6.

¹⁶⁰ *Ibid.*, at 3.

¹⁶¹ ICTR Statute *Supra* note 41 at Articles 3 and 4.

¹⁶² HRW *Supra* note 4 at 80-86.

¹⁶³ *Ibid.*, at 91-97.

investigators that rape is somehow a ‘lesser’ or ‘incidental’ crime not worth investigating.’¹⁶⁴ In spite of the glaring evidence that rape had taken place on a massive scale in Taba as well as all over the country, the *Akayesu* case initially went to trial with no charges of rape, with the prosecutor maintaining that it was impossible to document rape because women would not talk about it.¹⁶⁵ It is evident that, at this juncture, rape was still considered a mere by-product of conflict, and was not being treated with the necessary gravity.

During the *Akayesu* trial two female witnesses were brought forth to provide evidence concerning crimes that took place in the Taba Commune. Although the prosecution notably did not question the witnesses about rape or sexual violence, the only female judge on the Trial Chamber, Honourable Navanethem Pillay, intervened and pursued a line of questioning that resulted in confirmation from the two witnesses that they had been raped and had witnessed and/or known of other rapes that took place within the commune. The outraged judge then stated that she was ‘extremely dismayed that [the Tribunal was] hearing evidence of rape and sexual violence against women and children, yet it is not in the indictments because the witnesses *were never asked about it* [emphasis added].’¹⁶⁶ The fact that prosecutors did not even consider questioning female witnesses about rape is illustrative of how little importance was attached to crimes of sexual violence committed during the genocide. Subsequently, numerous extra-judicial efforts were exerted in order to ensure the indictment was amended to include charges of rape or sexual violence.¹⁶⁷ That the only female judge in the court was the one to draw attention to the issue of rape is no coincidence: ‘[t]he lessons from the Rwanda and Yugoslavia Tribunals make it clear that the presence of female judges, as well as the presence of women in senior positions in the prosecutor’s office, contributes significantly to the effective prosecution of sexual violence against women’.¹⁶⁸ Judge Pillay summed up the importance of the composition of the court as follows: ‘Who interprets the law is at least

¹⁶⁴ Ibid., at 94.

¹⁶⁵ Ibid., at 95.

¹⁶⁶ Jan Goodwin ‘Rwanda: justice denied’ (1997) 6(4) *On the Issues*. Available at <http://www.echonyc.com/-onissues/f97rwanda.html> [Accessed on 12 October 2006].

¹⁶⁷ Copelon *Supra* note 16 at 225.

¹⁶⁸ Rehn and Johnson-Sirleaf *Supra* note 12 at 95.

as important as who makes the law, if not more so . . . I cannot stress how critical I consider it to be that women are represented and a gender perspective integrated at all levels of the investigation, prosecution, defence, witness protection and judiciary.’¹⁶⁹ It is evident, therefore, that in order to ensure the consistent application of the law concerning international crimes of sexual violence, criminal tribunals and courts must have equal representation of women on the bench and in the office of the prosecutor. Equally as important, however, is the need to ensure that all judges and officers of the court are experienced or trained in gender issues.

The presence of women on the bench and as officers of the court, while important, does not necessarily guarantee prosecution of gender crimes. Engendering the Tribunal’s bench and prosecutor’s office, however, is of virtually no use if the prosecutorial strategy does not include the prioritisations of crimes of sexual and gender-based violence. Nowrojee’s study illustrates the vital importance of political will in prosecutions of crimes of sexual violence and attributes the failure to adequately investigate and prosecute such crimes on a lack of sustained attention by the leadership in the prosecutor’s office: ‘Despite the rhetoric and the repeated pronouncements expressing a commitment to prosecuting rape, the Prosecutor’s Office has never articulated and pursued a consistent prosecution strategy, including how this crime fitted into the genocidal policies of the leaders, nor has it consistently employed effective investigative techniques to fully document the crimes against women.’¹⁷⁰ Through her review, it is evident that inclusion of charges of sexual violence crimes in indictments depends a great deal on the policy and strategy of an individual: the head prosecutor.¹⁷¹ To wit, during the tenure of Louise Arbour from October 1996-August 1999, political will to prosecute crimes against women and young girls was evident and ‘sexual violence amendments were added to a number of cases, and rape charges were increasingly included in the new indictments. By the last year of her mandate, all new indictments contained sexual

¹⁶⁹ Cited in Barbara Bedont and Katherine Hall Martinez ‘Ending Impunity for Gender Crimes under the International Criminal Court’ *Brown Journal of World Affairs* (1999) 6(1): 65-85.

¹⁷⁰ Nowrojee *Supra* note 22 at 8.

¹⁷¹ *Ibid.*, at 9-13.

violence charges.’¹⁷² Unfortunately, however, during Carla del Ponte’s tenure from September 1999 to October 2003, ‘there was a steady decline in the number of new indictments that contained sexual violence charges, as well as a lack of commitment to adequately develop the evidence in cases where rape charges had previously been included. The sexual assault investigations team was disbanded, and investigations of sexual violence faltered.... By [her] final year, none of the new indictments contained rape charges.’¹⁷³ According to quantitative data regarding the trends in prosecution of sexual violence, the proportion of indictments pertaining to sexual violence fell from 100% in 1999-2000 to 35% in 2001-2002:

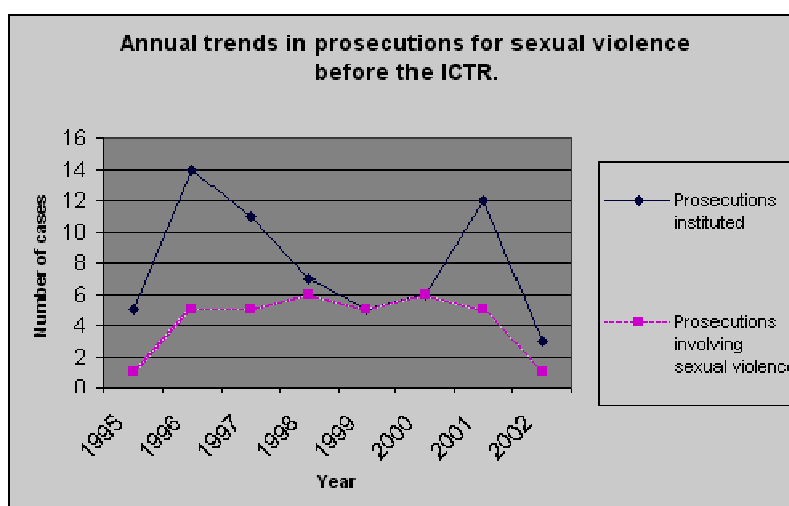


Image Source: Women’s Human Rights in Conflict Situations¹⁷⁴

This drastic change is attributed to a change of strategy wherein Del Ponte’s focus was on expediting the notoriously slow pace of ICTR trials, rather than on ensuring the prosecution of rape and sexual violence.¹⁷⁵

Evidently, lack of political will results in a lack of comprehensive strategy, which is reflected in a weak infrastructure, which in turn results in inadequate investigations characterized by lack of communication, lack of skills in obtaining evidence of rape and

¹⁷² Ibid., at 10.

¹⁷³ Ibid., at 10.

¹⁷⁴ Gaëlle Breton-Le Goff ‘Analysis of trends in sexual violence prosecutions in indictments by the International Criminal Tribunal for Rwanda (ICTR) from November 1995 to November 2002’ (2002). Available at http://www.womensrightscoalition.org/site/advocacyDossiers/rwanda/rapeVictimssDeniedJustice/analysisoftrends_en.php [Accessed on December 21 2006].

¹⁷⁵ Nowrojee *Supra* note 22 at 10.

sexual violence from victims, and lack of training on gender issues. For example, in 2003, out of the 100 investigators in the prosecutor's office, only five were women; moreover, the sexual assaults team has never comprised of more than 10 individuals—an almost insignificant fraction of the tribunal's workforce.¹⁷⁶ The outright lack of commitment to prosecuting crimes of sexual and gender-based violence sends a direct message to victims that these crimes trivial in comparison to other gross violations of human rights and are, therefore, not a priority. Furthermore, it renders ineffectual any statutory developments that have been made thus far ineffectual and raises the question as to what purpose this transitional justice mechanism truly serves for victims of sexual violence.

The consequences of lack of political will are evident in several prominent cases that eventually went to trial without the inclusion of charges of sexual violence, despite a plethora of available evidence of rape and sexual violence. In the Cyangugu case, for example, three former government officials were on trial for genocidal massacres and other crimes against humanity.¹⁷⁷ Rwandan women in Cyangugu had organized themselves in order to assist the ICTR staff in collecting testimonies providing evidence of rape and sexual violence and had further pledged their willingness to testify; a widows' organization, AVEGA, issued a public statement pleading that the ICTR not ignore the rape that had occurred in Cyangugu;¹⁷⁸ and two witnesses provided testimony of the sexual violence that had occurred. An amendment to the initial indictment was filed late by the prosecutor's office, and then withdrawn in 1999. As a result, when a third witness was being questioned about rape and sexual violence in February 2001, the judges barred the testimony on the grounds that *it had not specifically been included in the initial indictment*.¹⁷⁹ The case resulted in two acquittals and one conviction, with the

¹⁷⁶ Ibid., at 13.

¹⁷⁷ *Prosecutor v Emmanuel Bagambiki and Samuel Imanishimwe and Prosecutor v André Ntagerura* (Trial Chamber) Case No. ICTR-99-46-T (10 July 2000).

¹⁷⁸ Association of Widows of the Genocide of April 1994 'Sexual violence in Cyangugu: a testimonial.' Available at www.ichrdd.ca/english/commdoc/publications/women/bulletin/vol4no1/testimonialcyangugu.html [Accessed October 12 2006].

¹⁷⁹ Nowrojee *Supra* note 22 at 16.

prosecution maintaining that an amendment to the indictment of acts of sexual violence would have delayed the trial.¹⁸⁰

This is but one example that demonstrates why victims of sexual and gender-based violence are distrustful of the ICTR and are highly dubious about its ability to deliver justice. Furthermore, it demonstrates the precariousness of prosecutorial strategy being determined by an individual's priorities, rather than being explicitly included in an official mandate. This inevitably leads to inconsistency, injustice on the part of the victims, and ultimately results in a loss of credibility for a Tribunal that has the potential to make significant gains in terms of sexual and gender-based violence. If such crimes are to be prosecuted successfully, they must be investigated and indicted according to international standards, and investigators and prosecutors must be trained in gender crimes and be sensitised as to the needs of the victims and witnesses. Without the participation of women survivors, the prosecution would not be able to successfully prosecute crimes of sexual violence.

IV.2.1.2 Procedural Obstacles at the ICTR

The literal and figurative distance between the ICTR and the people of Rwanda appears to present the most significant obstacle to the tribunal's contribution to executing justice and to ensuring peace and reconciliation in the country. In a study conducted by Alison Des Forges and Timothy Longman in 2002 regarding the impact of the tribunal on the people of Rwanda, 'respondents complained that the trials were held far away from Rwanda and were organized using western-style judicial practices that place a heavy emphasis on procedure and have little concern for community interests.'¹⁸¹ One of the goals of retributive justice, as outlined in Chapter III, is to establish adherence to rule of law and to restore society's faith in the country's administrative and judicial systems. If the society is unable to relate to a mechanism of transitional justice, however, and continues to perceive it as a foreign apparatus, it is highly unlikely that it can contribute in any way to the reconciliation process. Since it is virtually impossible for genocide

¹⁸⁰ Ibid.

¹⁸¹ Alison Des Forges and Timothy Longman 'Legal responses to genocide in Rwanda' in Weinstein and Stover *Supra* note 9 at 59.

survivors to witness the trials firsthand, bridging the gap requires the maintenance of communication between the ICTR and the people, something that has been sorely lacking throughout the Tribunal's proceedings. Although the ICTR has made certain efforts to respond to the need for information—such as establishing an information centre in the capital city of Kigali—there are no outreach programs conducted in the local language (*Kinyarwanda*) that are able to reach the rest of the country.¹⁸²

Respondents in the Des Forges and Longman study further complained about mistreatment of witnesses and about the foreign nature of the adversarial legal approach used in trials, in which 'survivors of the genocide [play] no formal role other than as witnesses.'¹⁸³ This approach is far removed from the traditional Rwandan communal system of conflict-resolution, and therefore further alienates the people from the process. For victims of sexual violence, in particular, the alienation is further compounded by lack of information and follow-up from the Tribunal during and after the arduous process of providing testimony. The nature of the process is such that witnesses are sequestered prior to and following their court appearance and—although provided with protection—are provided with little or no information on the trial process. Furthermore, upon their return to Rwanda, they receive little or no follow-up information on the progress or outcome of the trial.¹⁸⁴ As a result, rape victims who testify are left feeling used and, in some cases, re-victimized by the process. The involvement of victims in trials, other than as witnesses, tends to deny survivors the 'cathartic experience of a process that focuses on them as victims.'¹⁸⁵ The tribunal's failure to integrate victims into the process through the dissemination of information fosters a lack of faith on the part of survivors who can only interpret the process as justice denied.

One of the most notable shortcomings of the ICTR is that, in addition to witnesses feeling alienated and mistreated, they also feel demeaned and disrespected by the tribunal and are therefore reluctant to cooperate and give testimony. Many witnesses have complained of

¹⁸² Nowrojee *Supra* note 22 at 21.

¹⁸³ Des Forges and Longman *Supra* note 181 at 56.

¹⁸⁴ Nowrojee *Supra* note 22 at 21.

¹⁸⁵ Sarkin *Supra* note 15 at 148.

degrading treatment at the hands of the tribunal, the most infamous incident occurring during the cross-examination of a witness who had been subjected to rape and sexual torture. During the witness' testimony, all three judges on the panel were laughing, apparently at an inappropriate and absurd line of questioning from the defence council, and the unexplained laughter was perceived as intimidation and mockery of the witness.¹⁸⁶ In a separate incident, during a fact-finding mission, defence lawyers were found to have degraded and discredited women by demanding that they name, unnecessarily and in extreme detail, sexual organs and how they were used during violations¹⁸⁷—a demand that exposes blatant cultural insensitivity and is essentially a tool of re-victimization. Finally, women complain of not having received the necessary witness protection as required by the Rules of the Tribunal.¹⁸⁸ The lack of anonymity and confidentiality regarding court transcripts has left many women vulnerable and susceptible to retaliation attacks upon returning to their communities. In fact, numerous women who have testified at the ICTR have lost their lives as a result of the lack of safeguards in place to ensure their identities are protected.¹⁸⁹ As a result of occurrences such as these over the years, numerous survivors' organizations have chosen to forego all cooperation with the ICTR.¹⁹⁰

Judging from these experiences, it appears as though the strict retributive nature of the tribunal necessitates that the justice served has little to do with the victims of conflict. Yet, in what Franke describes as 'a perverse fact' of the retributive approach to transitional justice, witnesses are essentially 'invaluable resources in the production of wholesale justice, but [unfortunately] the individuals become less important than the larger principles which their testimony helps establish.'¹⁹¹ Consequently, this treatment of victims and witnesses reinforces the erroneous notion already prevalent in the minds of survivors of sexual violence that such crimes are either private (and therefore not punishable) or merely a by-product of conflict. The maltreatment of witnesses highlights

¹⁸⁶ Julia Crawford, 'Rwanda tribunal witnesses unhappy with their treatment,' Hironde News Agency, 29 May 2001 cited in Des Forges and Longman *Supra* note 181 at 51.

¹⁸⁷ Rehn and Johnson-Sirleaf *Supra* note 12 at 96

¹⁸⁸ ICTR Statute *Supra* note 41 at Article 21.

¹⁸⁹ Rehn and Johnson-Sirleaf *Supra* note 12 at 96.

¹⁹⁰ Crawford *Supra* note 186.

¹⁹¹ Franke *Supra* note 105 at 819.

the fact that retributive mechanisms of transitional justice such as tribunals need to incorporate further safeguards in order to ensure the protection of victims and witnesses. Considering how far international law has advanced in terms of defining crimes of sexual and gender-based violence, this oversight on the part of the ICTR represents a considerable setback in the transitional justice process.

IV.2.2 National Retributive Justice Mechanism: the ‘Classic’ Courts

In addition to the establishment of the ICTR, the Rwanda transitional government itself embarked on a process of legal reform in order to address the heinous violations of human rights that were so flagrantly committed during the genocide. The national judicial system became the primary avenue for prosecuting those lower-level actors who were not among the organizers, but who actively participated in the genocide. In the immediate aftermath of the genocide this judicial system was more or less nonexistent. In terms of human resources, almost all members of the judiciary had either been massacred or had fled into exile, to the extent that ‘by the end of the genocide, Rwanda counted only twenty judicial personnel responsible for criminal investigations and only nineteen lawyers.’¹⁹² In addition, the physical destruction that took place during the genocide left the infrastructure significantly weakened. Moreover, existing laws at the time of the genocide were grossly insufficient to contend with the nature, scale, and intensity of the crimes committed—particularly crimes of sexual and gender-based violence, which were so widespread and ubiquitous throughout the conflict.

IV.2.2.1 Statutory Developments

Prior to the genocide, the only provisions in place to prosecute crimes of sexual violence were contained within the 1977 Rwandan Penal Code. The Penal Code prohibits defilement, rape, torture and sexual torture but legal definitions of these acts are not provided.¹⁹³ With respect to sexual torture, though not explicitly referred to as such, Article 316 provides that a person who commits ‘torture or acts of barbarity’ during the

¹⁹² International Crisis Group ‘Five years after the genocide: justice in question’ (1999) at 34. Available at <http://www.crisisgroup.org/home/index.cfm?id=1412&l=1> [Accessed on 23 November 2006].

¹⁹³ Rwandan Penal Code, Articles 358-362.

commission of a crime incurs the same punishment as one who commits murder.¹⁹⁴ When the transitional government took power, 120,000 people were detained for various crimes of genocide, including rape and sexual torture and mutilation. Inevitably, the judiciary was severely overwhelmed and increasingly incapable of bearing the burden imposed by the large number of individuals awaiting prosecution for genocide, and it was evident that the existing penal code would not suffice. To this end, the State enacted the Organic Law No.08/96 of 30th August 1996 on the Organization of Prosecutions for Offences Constituting the Crime of Genocide or Crimes Against Humanity Committed Since 1 October 1990 (hereafter, Genocide Law). The Genocide Law was passed, therefore, in recognition of the fact that ‘the exceptional situation in the country requires the adoption of specially adapted measures to satisfy the need for justice of the people of Rwanda.’¹⁹⁵ The key aspect of the 1996 Genocide Law is the categorization of genocide defendants into four Categories, as delineated in its Chapter 2, Articles 2-3. Perpetrators of sexual and gender-based violence fall into Category One, which defines the most serious offenders as:

- persons whose criminal acts or whose acts of criminal participation place them among the planners, organizers, instigators, supervisors and leaders of the crime of genocide or of a crime against humanity;
- persons who acted in positions of authority at the national, prefectoral, communal, sector or cell level, or in a political party, the army, religious organizations or in a militia and who perpetrated or fostered such crimes;
- notorious murderers who by virtue of the zeal or excessive malice with which: they committed atrocities, distinguished themselves in their areas of residence or where they passed;
- and persons who committed acts of sexual torture;

In this instance, sexual torture refers to ‘grave sexual torture, which can include repeated rape or mutilation.’¹⁹⁶ This interpretation harmonizes with Article 316 of the Rwandan Penal Code, which likens the use of torture for the purposes for executing a crime to

¹⁹⁴ Ibid., Article 316.

¹⁹⁵ Preamble, Organic Law No.08/96 of 30th August 1996 on the Organization of Prosecutions for Offences Constituting the Crime of Genocide or Crimes Against Humanity Committed Since 1 October 1990 (1996).

¹⁹⁶ Amnesty International “‘Marked for death’: Rape survivors living with HIV/AIDS in Rwanda’ (2004) at 8. Available at <http://web.amnesty.org/library/print/ENGAFR470072004> [Accessed on December 20 2006].

murder.¹⁹⁷ Reinforcing the notion of sexual violence as a most serious violation is the fact that, as per Chapter III of the Genocide Law, there exists a possibility for the reduction of punitive measures upon confession or the entry of a guilty plea for all Categories *except* Category One. This provision is critical and momentous because it mirrors the developments made at the international level by placing crimes of sexual torture on equal footing, in terms of gravity, as the rest of the genocide crimes considered most serious. Furthermore, as part of its transitional process, Rwanda adopted a new Constitution in 2003 that provides for the country's adherence to various instruments of international human rights law¹⁹⁸ and emphasizes the country's commitment 'to ensuring equal rights between Rwandese and between women and men without prejudice to the principles of gender equality and complementarity in national development.'¹⁹⁹ This further commitment to incorporate principles of international human rights law and to ensure gender equality further sets the legal context for addressing crimes of sexual and gender-based violence in Rwanda.

IV.2.2.2 Investigation and Prosecution

As in the case of the ICTR, despite the statutory developments establishing sexual and gender-based violence as some of the most serious crimes committed during the genocide, the transitional justice process through Rwanda's national courts is plagued by substantial and procedural obstacles both in terms of investigation, and of prosecution of such crimes in Rwanda's national 'classic' courts. Classic courts are referred to as such to differentiate the formal legal system from the informal *gacaca* courts. As mentioned earlier, in the aftermath of the genocide the primary avenue for addressing crimes of sexual violence is through prosecution in the national courts. From December 1996 to December 2003, in both the civil courts (Tribunals of First Instance) and military courts, 9,728 persons accused of genocide, and of crimes against humanity or of related crimes were brought to trial. Out of the 1000 cases reviewed by Human Rights Watch, only

¹⁹⁷ Avocats Sans Frontiers cited in Ibid.

¹⁹⁸ *Constitution of the Republic of Rwanda* (2003) 'Preamble', Para. 9. Available at www.jurisafrica.net/docs/constitutions/THE%20CONSTITUTION%20OF%20THE%20REPUBLIC%20OF%20RWANDA.pdf [Accessed on 12 May 2006].

¹⁹⁹ Ibid., at Para. 10.

thirty-two included charges of rape or sexual torture.²⁰⁰ Furthermore, ‘the review of genocide judgments reveals the paucity of genocide sexual violence prosecutions and an onerous caseload that has delayed genocide trials and subjected those accused of genocide—including rape—to extended pre-trial detention.’²⁰¹ The success level of prosecution varied based on geography and other circumstances. However, ‘genocide trials involving rape fall far short of the estimated tens of thousands of acts of sexual violence during the genocide.’²⁰² Prosecutors attribute the low rate of prosecutions of crimes of sexual violence primarily to the failure of victims to report the crimes committed against them. There are numerous factors contributing to why women and girls are reluctant to come forward and why those who do continue to meet with obstacles to justice.

A significant contributing factor to underreporting of sexual violence cases is the fact that there are some instances in which women are unable to report sexual violence, even if they are willing: there are cases in which women simply do not know or remember the identities of their attackers,²⁰³ particularly in instances of gang rape, or sexual assault that took place outside the region in which they lived. In addition there is the ever-present fear of stigmatisation which, combined with shame and self-blame, leads many victims to internalise their grief and trauma in order to protect themselves: one victim refused to tell even her husband about her rape because ‘for a very long time, [she has] despised the sin of adultery.’²⁰⁴ The reluctance to report crimes of sexual violence stems not only from fear and shame, however, but also from a general distrust of the legal system. On January 1 2003, a Presidential decree provisionally released over 40,000 detainees who had been awaiting trial for genocide. Detainees included youth, the elderly, the infirm, those who had served over half the sentences applicable to the crime in question and—subsequently—those who had confessed and pleaded guilty to lesser acts of genocide as

²⁰⁰ Ibid., at 18.

²⁰¹ Ibid., at 19.

²⁰² Ibid., at 20.

²⁰³ Ibid., at 23.

²⁰⁴ Ibid., at 24.

outlined in the 2001 Organic Law on Genocide.²⁰⁵ Members of the latter group are released conditionally, and must face the traditional *gacaca* courts. Although sexual violence survivors have reacted in a variety of ways to the actual and/or prospective release of detainees, the potential and actual re-traumatisation of coming face to face with their attackers without having seen justice served has shaken survivors' faith in the justice system,²⁰⁶ it raises questions as to whether or not the State can truly afford them legal protection. Finally, women tend not to come forward because they remain generally unaware of their legal rights and of the protections available to them, such as the right to provide testimony in writing or in camera in order to ensure privacy.²⁰⁷ Underreporting of crimes of sexual and gender-based violence, therefore, is largely due to victims' insecurity based not only on feelings of shame and fear, but also on ignorance about and mistrust of the legal system. For those women who manage to circumvent these hurdles and find the impetus to come forth, further obstacles exist in the form of substantial and procedural limitations within the formal legal system that threaten to hinder the process of justice.

As with the ICTR, in terms of jurisprudential and procedural obstacles, several key issues stand between the victims of sexual and gender-based violence and the justice they seek. The first is the lack of a clear definition of rape and sexual torture in the Penal Code, which ultimately leads to inconsistency in verdicts: '[a]n examination of judgments in genocide trials reveals that the failure to define rape in the Penal Code had contributed to considerable confusion among witnesses, accused, prosecutors, and judges. The reliance on judicial discretion to characterize an act of sexual violence has produced inconsistent guilty verdicts and punishments.'²⁰⁸ The lack of clarity leads to confusion, therefore, at several stages, including the pre-trial stages in which prosecutors are determining what charges to include in an indictment. The absence of a clear and concise definition of rape and other forms of sexual violence is imperative at this stage because, as demonstrated

²⁰⁵ Office of the Prosecutor, Supreme Court of Rwanda *Directive Concerning Implementation of the Presidential Statement of 1 January 2003 on the Provisional Release of Different Categories of Prisoners*, January 9 2003.

²⁰⁶ Interview with I.B, Ntongwe district, Gitarma Province, February 23, 2004 in HRW *Supra* note 22 at 17.

²⁰⁷ *Ibid.*, at 22.

²⁰⁸ *Ibid.*, at 32.

earlier in the context of the ICTR, whether or not such crimes are included in an indictment depends on how the individual prosecutor interprets their respective definitions.

The second obstacle hindering the investigation process is the fact that some rape charges are never filed or followed through, even when a case has been reported to authorities: ‘the women who complained of authorities’ failure to record the charges of...sexual violence reported that their alleged rapists were imprisoned for crimes other than sexual violence and had since been granted provisional release’ as per the Presidential Order.²⁰⁹ As such, women who have risked stigma, ostracisation, and threats on their life have had to contend with the return of their attackers to their community upon provisional release, without having been punished for the torture they inflicted. In fact, according to NGO representatives and victims, ‘in the initial period after the genocide investigators often did not consider rape to be as serious an offense [sic] as other accusations, such as murder, against the same suspect.’²¹⁰ Consequently, the authorities send the message that crimes of sexual violence do not warrant the same attention and punishment as other crimes of genocide and women become increasingly reluctant to expose themselves by reporting crimes that are likely to be ignored. As has been illustrated by the situation in the ICTR, reliance on an individual’s interpretation of the law or prioritisation of crimes leads to inconsistency, and ultimately to a miscarriage of justice. A clear strategy and mandate is therefore necessary, at all stages of investigation and prosecution, in order to ensure crimes of sexual and gender-based violence are a priority and are accorded the same treatment as other Category One crimes.

The lack of women in positions of authority within the Rwandan legal system presents yet another obstacle to justice. As was demonstrated in the ICTR’s *Akayesu* case, the importance of female judges and court personnel is essential in ensuring access to justice for crimes of sexual and gender-based violence. In Rwanda, women continue to be underrepresented within the national police force, the Prosecutor General’s office, and

²⁰⁹ Ibid., at 34.

²¹⁰ Ibid., at 20.

within the courts.²¹¹ Human Rights Watch maintains that '[p]ersons who have suffered sexual violence continue to experience trauma for a long period after the assault, and female victims are more willing to confide in other women.'²¹² The under representation of women in positions of authority combined with insufficient resources and inadequate training of judicial personnel present further obstacles to justice for victims of rape and sexual violence.

The final substantial obstacle, which is inherent in the widespread nature of sexual violence during the genocide, is lack of evidence: there have been numerous instances in civil and military courts in which 'the court dismissed rape charges due to lack of direct testimony from the victims, who had died following the rape. [In other cases] the court held that the testimony of the victim and other witnesses alone did not adequately prove that the accused committed rape.'²¹³ As it stands, victims of sexual violence are generally reluctant to report crimes where there were no other witnesses present, for fear of not being believed.²¹⁴ This issue, therefore, is particularly difficult to resolve, because even if rules of procedure and evidence are scrupulously followed, when the judges decide the evidence is insufficient, the subsequent dismissal of charges ultimately contributes to shattering victims' faith in the justice system—an element so essential to the process of transitional justice. Among the many other thorny obstacles is the lack of protection for witnesses during and after the trial process: as it stands, the Code of Criminal Procedure does not require court judgments to redact the names and identifying information of rape complainants.²¹⁵ This lack of privacy and confidentiality leaves victims and witnesses vulnerable and reluctant to be forthcoming in terms of reporting crimes of sexual and gender-based violence. It is also further evidence that the role of the witness in the retributive justice system is secondary, at best, and that justice is focused more on the punishment of the individual, rather than on the impact on the victim.

²¹¹ HRW *Supra* note 22 at 44.

²¹² *Ibid.*

²¹³ *Ibid.*, at 31.

²¹⁴ *Ibid.*, at 23.

²¹⁵ *Ibid.*, at 28.

IV.3 Rwanda's Restorative Justice Mechanisms: the *Gacaca* Courts

Although the Genocide Law laid the foundation for addressing genocide crimes and crimes against humanity, the legal system faced overwhelming obstacles in the subsequent attempt to implement the law. After attempting to try genocide suspects using the classic legal system, the slow pace of prosecutions and of rendering justice resulted in only 6,000 cases being tried out of over 120,000 in a period of five years.²¹⁶ At the rate at which the trials were going, it was estimated that it would take possibly sixty years to try all detained suspects.²¹⁷ Given this backlog of cases, the government of Rwanda sought an alternative to the classic legal system and turned to the traditional *gacaca* courts. The word *gacaca* literally means “on the lawn” in reference to the patches of grass where members of a community gather to resolve disputes amongst themselves. Traditional *gacaca* is an informal mechanism for conflict resolution at the local level that exists at the margins of the State and was used to handle affairs of little or no legal consequence. It is important to note, however, that *gacaca* as practiced in post-independence Rwanda was not fully informal, because it involved the intervention of local authorities to whom the State assigned the responsibility of resolving conflicts that occur at the local level.²¹⁸ Largely, however, the *gacaca* courts are a community-based mechanism generally classified as restorative.²¹⁹

The decision to utilize the restorative mechanism of traditional *gacaca* courts to deal with the legal crisis came about after a series of nation-wide consultations held over a period of one year in which the government consulted with legal experts, civil society, and the private sector. The debate centred on the fact that, even though the *gacaca* courts would expedite prosecution and ease the burden on the courts, there was a danger that, if conducted in the manner of a truth commission, the process would grant amnesty to perpetrators of genocide, which was not a viable option for achieving the goals of justice

²¹⁶ HRW *Supra* note 22 at 14.

²¹⁷ Official Website of the Inkiko Gacaca, ‘Overview.’ Available at [http://www.inkiko-gacaca.gov.rw/ En/EnIntroduction.htm](http://www.inkiko-gacaca.gov.rw/En/EnIntroduction.htm) [Accessed on April 21 2006].

²¹⁸ Filip Reyntjens ‘La Gacaca ou la Justice du Gazon au Rwanda’ *Politique Africain* 40 (1990) : 31-41.

²¹⁹ See Sarkin *Supra* note 15, Anderlini et al *Supra* note 95, and Rehn and Johnson Sirleaf *Supra* note 12 at 93.

and reconciliation.²²⁰ Aware of the significant obstacles facing restorative mechanisms, and taking into account the need to impose punitive measures, as well as the need to ensure national and societal reconciliation and reconstruction, a compromise was reached that established a modernized adaptation of the traditional courts, as enshrined in the Organic Law on Gacaca (hereafter, Gacaca Law), which was adopted in January 2001.²²¹ The Gacaca Law retained the principles enshrined in the 1996 Genocide Law regarding the categorization of suspects, and the provisions for confession and guilty pleas; it established approximately 11,000 *gacaca* courts at different administrative levels—the cell, sector, district, and province levels; and—most significantly—it expanded Category One to include, not only sexual torture, but the crime of rape as well.²²² A subsequent Organic Law on the organization and functioning of the *gacaca* courts was passed in 2004 which, in line with the provisions within the Rome Statute and the Statute of the Special Court of Sierra Leone, provides for the establishment of new safeguards for rape victims. Under the 2004 Gacaca Law, rape victims now have three options for private testimony in *gacaca* courts and are also prohibited from publicly confessing to rape, ostensibly in order to protect the victim's identity.²²³

The *gacaca* tribunals provide a forum within which the accused is given the opportunity either to confess or to answer to the charges against him/her and to provide his/her own account; the members of the panel of judges are given the opportunity to question both the accused and the general assembly; and the members of community are given the opportunity to provide testimony and to seek answers from the accused. This system, therefore, seeks to individualize responsibility for the genocide, in the spirit of retributive justice, as well as to use an existing mechanism of conflict resolution in order to encourage dialogue and promote reconciliation, in the spirit of restorative justice. The

²²⁰ Alice Karekezi, Alphonse Nshimiyimana, and Beth Mutamba 'Localizing justice: *gacaca* courts in post-genocide Rwanda' in Stover and Weinstein (eds) *Supra* note 9 at 69-84.

²²¹ The full title of the law is Organic Law No. 40/2000 of 26/01/2001 Setting up Gacaca Jurisdictions and Organizing Prosecutions for Offences Constituting the Crime of Genocide or Crimes Against Humanity Committed Between October 1, 1990 and December 31, 1994 (hereafter, Gacaca Law).

²²² *Ibid.*, Title II, Chapter I.

²²³ Organic Law N°16/2004 Of 19/6/2004 Establishing The Organisation, Competence And Functioning Of Gacaca Courts Charged With Prosecuting And Trying The Perpetrators Of The Crime Of Genocide And Other Crimes Against Humanity, Committed Between October 1, 1990 And December 31, 1994 at Article 38.

new hybrid system of *gacaca* that was created by the 2001 Gacaca Law, therefore, is official and has adopted characteristics of formal justice which distinguishes it from the traditional system: trials are no longer voluntary but coercive under the authority of the State, sanctions are punitive, the gravity of the crimes treated is much greater, the parties concerned are not always present, there are a variety of fixed rules to follow, and there is an attempt to create an impartial tribunal.²²⁴ On the other hand, elements of traditional *gacaca* are maintained in the sense that the tribunals remain local in character and emphasis is placed on social restoration, with a system of reduction of punishments and a role for reparations; emphasis on popular participation and the significance of social pressure; simplification of the procedures; and the absence of professional judicial participation.²²⁵ The *gacaca* court, therefore, is largely a restorative justice mechanism that has been adapted to deal with gross violations of human rights, in accordance with international human rights law, but it also incorporates elements of retributive justice.

IV.3.1 Challenges and Limitations to the *Gacaca* Process

The very nature of *gacaca* courts, therefore, requires a fusion of elements of retributive justice (individual criminal accountability) and restorative justice. Striking a balance between the two is precarious and the *gacaca* system has come under criticism for attempting to use a distinctly non-legal mechanism to address legal matters.²²⁶ As with other mechanisms of restorative justice, however, the *gacaca* system is intended to work in tandem with the formal legal system, particularly when dealing with Category One crimes, such as sexual violence. The central difference between Rwanda's retributive mechanisms and this particularly mechanism is the role of women in positions of authority. As opposed to Rwanda's retributive mechanisms, women are better represented in *gacaca* courts where they constitute 36 percent of *gacaca* judges in pilot courts at the cell level.²²⁷ This is of particular significance because, presently, the *gacaca* system represents the main avenue for legal redress of genocide and related crimes. Even victims of Category One crimes, like sexual violence, face the pre-trial *gacaca* process before

²²⁴ Karekezi et al *Supra* note 220 at 72.

²²⁵ *Ibid.*

²²⁶ *See Sarkin Supra* note 15.

²²⁷ *Ibid.*, at 50.

their cases are transferred to and adjudicated in the classic courts. Following the pilot phase, the State and *gacaca* officials recognized the deficiencies inherent in the *gacaca* process with respect to protection of sexual violence victims and witnesses, which led to the reforms included in the 2004 Gacaca Law.²²⁸ As it stands, a rape victim has three options: testimony before a single *gacaca* judge of her choosing; testimony to a judicial police officer or prosecutorial personnel, to be followed by complete processing of the rape case by the prosecutor's office.²²⁹ The primacy accorded to crimes of sexual violence, the engendering of the bench, and the safeguards put in place by the *gacaca* courts theoretically provide a more enabling atmosphere for dealing with crimes of sexual and gender-based violence. There remain, however, some significant limitations arising out of the restorative nature of this mechanism.

The primary limitation arises out of the very nature of *gacaca* courts: witness testimony before the public. In Rwanda, where few of the actual witnesses to the crimes committed during the genocide have survived, the system of accusations and of giving testimony is fragile. The general assembly of *gacaca* courts is composed of all members of the community, including the accused and their families and peers. Consequently, according to a study of the *gacaca* pilot phase, 'limitations arise from the small population of survivors who are available to testify...and psychosocial factors related to the climate of distrust and division.'²³⁰ The study maintains that when it comes to providing testimony, in one of the communities in which the *gacaca* process was first tested, 'it seemed that the sentiment of not wanting to attract enemies (*kutiteranya*) prevailed within the general population.'²³¹ This tension-filled atmosphere is even more so for victims of sexual and gender-based violence due to their ever-present fear of stigmatisation, reprisals, and social rejection.

Since the launch of the pilot program in June 2002, 581 *gacaca* courts in ten provinces had registered approximately 134 cases of rape or sexual torture, as compared to

²²⁸ Ibid.

²²⁹ Ibid.

²³⁰ Study conducted by the National University of Rwanda's Centre for Conflict Management (CCM) in Karekezi et al *Supra* note 220 at 81.

²³¹ Ibid., at 78.

approximately 3,308 cases of non-sexual violence crimes, such as murder, assault, or looting, brought before the same courts.²³² It is evident from the numbers that women are not coming forward to report crimes of sexual violence primarily due to the very public nature of the *gacaca* process. Notwithstanding the protections provided for in the *gacaca* law, the small population of local communities gives rise to the fear that even when testifying in camera, victims' privacy will be compromised.²³³ This fear is not unfounded, according to *Penal Reform International*, who has reported that rape victims, whose *gacaca* testimony may lead to life imprisonment or the death penalty for their alleged rapist, commonly face threats by fellow community members.²³⁴ Reprisal attacks on *gacaca* judges and on witnesses themselves have injected the already charged atmosphere of the *gacaca* courts with renewed fear and apprehension,²³⁵ which is felt most profoundly by the most vulnerable survivors—women and girls who continue to suffer the physical and psychological trauma of the sexual violence to which they were subjected.

IV.4 Conclusion

From the above discussion, it is clear that Rwanda's experience with transitional justice mechanisms both at the international level and at the national level reinforces the fact that, in any transitional society, the path to justice and reconciliation must also involve the institution of the supplementary safeguards to address society's specific needs. Rwanda recognized the limitations of employing either a strictly retributive or a strictly restorative mechanism by adopting its hybrid *gacaca* system. However, this mechanism itself still faces significant limitations. The approach to addressing such mass violations of human rights, therefore, must be multidimensional in nature, in order for the process to be truly effective and to create sustainable peace and reconciliation. The lack of specialized attention to crimes of sexual and gender-based violence relegates the crimes to secondary status, in relation to other war crimes, crimes against humanity, and crimes

²³² HRW *Supra* note 22 at 22.

²³³ *Ibid.*, at 25.

²³⁴ *Ibid.*, at 28.

²³⁵ Human Rights Watch, 'Rwanda: killings threaten justice for genocide authorities must ensure full, impartial accountability for recent killings' (2007). Available at <http://hrw.org/english/docs/2007/01/19/rwanda15126.htm> [Accessed on January 22 2007].

of genocide. While drafting legislation and creating transitional justice mechanisms are the first crucial steps on the path to justice and reconciliation in transitional societies, these steps must be followed by an implementation process that provides additional protection for victims of sexual and gender-based violence. Without these safeguards in place, legislation is essentially rendered ineffectual, and victims will continue to be re-victimized, will choose to remain silent out of fear, and will therefore be left without any true form of redress. The following chapter concludes the dissertation by expounding on the comprehensive model of transitional justice proposed in Chapter III in order to identify the factors necessary for the establishment of an appropriate model of transitional justice to address crimes of sexual and gender-based violence.

V Conclusion: Towards a Comprehensive Model of Transitional Justice

V.1 Introduction

The challenges and limitations outlined above ascertain that, in dealing with crimes of sexual and gender-based violence, relying on either a purely retributive or a purely restorative approach to justice results in the inevitable oversight of other key factors crucial to attaining the goals of transitional justice. Indeed, justice and reconciliation are processes that require unique approaches peculiar to each post-conflict situation. The prevalence and impact of sexual and gender-based violence during and in the aftermath of conflict necessitates taking into account various components of the justice process, and utilizing them in tandem in order to ensure redress for the victims, punishment for the perpetrators, and prevention of future violations. When a State relies solely on a single mechanism of transitional justice, it is taking a subjective approach to transitional justice, one that views justice through a narrow lens, focusing on a single element. Consequently, other crucial elements of the justice and reconciliation process are not addressed and the ultimate aims of transitional justice are not met. This chapter will discuss the merits of taking an objective, all-encompassing approach to transitional justice in order to realize true justice and reconciliation.

V.2 Comprehensive Model of Transitional Justice

For any State emerging out of conflict, societal reconstruction requires a multi-dimensional, holistic approach in order to achieve reconciliation and to prevent the recurrence of conflict. As such, these countries must employ a comprehensive model of transitional justice that combines their transitional justice mechanisms with other judicial and non-judicial processes aimed at addressing the factors that could lead to future conflict. This model should involve establishing retributive as well as restorative mechanisms; instituting legal and institutional reform; encouraging national dialogue and promoting reconciliation; and providing restitution for victims of sexual and gender-

based violence. In addition, it is crucial that an effective transitional justice framework include the experiences of women and girls, from the outset, not just in terms of legislation, but also throughout the implementation process. This, in and of itself, ensures that crimes of sexual and gender based violence are brought to the forefront and are no longer considered subordinate to other violations of international human rights law.

V.2.1 Establishment of Retributive Justice Mechanisms

A key element of a comprehensive model of transitional justice is establishing individual criminal responsibility through prosecutions at the national and/or international level through national courts, ad-hoc tribunals, the International Criminal Court, or ‘hybrid’ internationalized courts. As is evident from the discussion in the previous chapter, however, it is not merely enough to institute retributive mechanisms of transitional justice without ensuring clear definitions of sexual and gender based violence in their applicable law and without taking steps to engender the investigation and prosecution processes. In Rwanda, for example, in response to some of the challenges outlined in Chapter IV, a national strategic plan is in place in Rwanda to raise representation of women on the police force from 4% in 2004 to 30% in 2008, and the Ministry of Justice has also begun a recruitment campaign to raise the proportion of women in the justice system.²³⁶ Although these are efforts of which the effects remain yet to be seen, they are nevertheless positive developments that recognize the importance of engendering the transitional justice system at all levels in order to ensure redress for victims of sexual and gender-based violence. Rwanda’s national strategy serves to illustrate the importance of instituting specialized measures during both the investigation and prosecution processes in order to improve the effectiveness of retributive justice mechanisms.

As established in Chapters III and IV, transitional justice is far more effective in dealing with crimes of sexual and gender-based violence when States employ complementary mechanisms and rely on additional measures to facilitate implementation of the law. In the establishment of an international retributive justice mechanism, for example, it is

²³⁶ HRW *Supra* note 22 at 49.

imperative that additional measures are implemented to bridge the gap between the court and the post-conflict society. As demonstrated by the example of the ICTR, without the effective dissemination of information on a regular basis, a victim—and society in general—remains alienated from the process thereby compromising true justice and reconciliation. In addition, it is crucial that at both the national and international level, the prosecutor's office take the incentive to engender the investigative team, to include charges of sexual and gender based violence in indictments, and to broaden the scope of crimes of sexual violence that are prosecuted. One of the shortcomings of the investigative and prosecutorial process at the ICTR is that only about 1-2% of the investigative staff is dedicated to sexual violence and gender-based crimes.²³⁷ This is demonstrative of the low priority and lack of dedication given to such crimes—a fact which is directly reflected in the blatant exclusion of sexual violence charges in indictments brought before the Tribunal.

Another crucial aspect that must be included in any prosecutorial strategy is allowing for the possibility of widening the scope of crimes classified as crimes of sexual violence. In order to effectively prosecute all acts of sexual violence, sexual torture, and sexual slavery a prosecutor must take the specific circumstances of the conflict into account and seek to include all manner of sexual and gender-based violence, rather than focussing simply on rape. Such flexibility could ultimately lead to further development in international law. In May 2004, for example, the Special Court of Sierra Leone's Trial Chamber approved the addition of 'forced marriage' to the counts contained in an indictment against six defendants.²³⁸ This decision 'mark[ed] the first time that an international court recognized 'forced marriage' as a possible category of 'other inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health'²³⁹ within the legal definition of crimes against humanity.²⁴⁰ Without the political will of the prosecutor's office to broaden the definition of sexual and gender-based violence, this development would not have

²³⁷ Nowrojee *Supra* note 7 at 96.

²³⁸ See *Prosecutor v. Brima, Kamara & Kanu*, Case No. SCSL-04-16-PT, Decision on Prosecution Request for Leave to Amend the Indictment (May 6, 2004) in Nowrojee *Supra* note 7 at 101.

²³⁹ Special Court Statute *Supra* note 90 at Article 2.

²⁴⁰ Nowrojee *Supra* note 7 at 101.

occurred. It must be noted, however, that this type of development is directly reflective of the proactive attitude of an *individual* prosecutor and her/his commitment to address crimes of sexual and gender based violence. Retributive mechanisms of transitional justice, therefore, whether at the national or international level, should include a set mandate within the prosecutor's office that includes a commitment to engender the investigation process and to prosecute crimes of sexual and gender based violence alongside other gross violations of human rights. This commitment should also be reflected in the establishment of complementary restorative justice mechanisms, a key component of a comprehensive transitional justice model. In addition to instituting retributive mechanisms, States should also establish community-based mechanisms centered on truth-telling through confessions of perpetrators and testimony of victims and witnesses.

V.2.2 Establishment of Restorative Justice Mechanisms

As with mechanisms of retributive justice, restorative mechanisms must also include crimes of sexual and gender based violence in their mandates, and institute specialized mechanisms in order to ensure the participation and protection of victims. In Rwanda, for example, as mentioned in the previous chapter, the Gacaca Law has undergone reform that provides for specialized measures to deal specifically with crimes of sexual and gender based violence. Furthermore, in addition to previously existing training sessions for *gacaca* judges concerning procedure, ethics, trauma management, and genocide law, another training program has been initiated aimed at training higher-level *gacaca* judges in sexual and gender-based violence training, specifically. Due to insufficient resources and logistical constraints, however, the program could only reach 150,000 cell-level *gacaca* judges.²⁴¹ Indeed, the success of training and recruitment programs depends a great deal on available resources. Nevertheless, lack of adequate resources notwithstanding, this is a crucial advancement: the recognition that special training is needed concerning these crimes and the effort to engender the *gacaca* process are positive developments. The combined effects of instituting such training programs,

²⁴¹ Ibid.

ensuring the election and appointment of a significant percentage of female judges and members of staff (as mentioned above in Chapter IV), and the implementing the reforms reflected in the 2004 Gacaca Law are such that the *gacaca* environment can potentially become more accommodating for victims who have heretofore been reluctant to bring accusations or to testify. Restorative justice mechanisms, therefore, must provide victims of sexual and gender-based violence with the option of such an enabling atmosphere in order to afford them respect and dignity and represents the recognition of the psychosocial impact of such crimes. This, in turn, lays the groundwork for the eventual realization of justice and reconciliation, provided these mechanisms work in concert with retributive mechanisms.

In recognition of the need to utilize complementary mechanisms of transitional justice, Rwanda is currently employing a dual approach that emphasizes both the importance of establishing individual and command responsibility, and the importance of truth-telling and of ensuring that the voices of victims are heard. There is danger, however, of these voices remaining silent, if victims of sexual and gender-based violence are not accorded the necessary protection in each forum of transitional justice through the institution of specialized mechanisms, as discussed above. In terms of retributive justice mechanisms, whether national or international, criminal prosecutions, as Franke correctly argues, ‘must surely be one component of a comprehensive program of transitional justice, yet standing alone they necessarily fall short in delivering full justice for gender-related atrocities of the recent past.’²⁴² The fact that there is no real role for victims in a formal legal mechanism means that justice is only focused on the punishment of the accused, and as such has no real, sustained impact on the victims themselves. In fact, without the necessary measures in place to protect victims, the process of participating in the trial process can lead to re-victimization. As such, it is necessary that victims be made to feel part of the legal process, in order for true justice to be realized. In much the same way, restorative justice mechanisms such as truth and reconciliation commissions and traditional courts require that victims feel a part of the process. In terms of sexual and gender based violence, this necessitates the implementation of special measures aimed

²⁴² Ibid., at 7-8.

specifically at survivors, judges/commissioners, and the public in general, in order to ensure an enabling environment. In addition, since restorative justice mechanisms are not legal in nature, they must ensure that they are complying with international human rights standards in order to afford protection for victims.²⁴³ Ensuring this compliance can be facilitated by the reform of legislation and of institutions in order to reflect international human rights developments.

V.2.3 Legislative and Institutional Reform

In addition to establishing the transitional justice mechanisms discussed above, it is imperative that every transitional society emerging from conflict undertakes the reform of archaic institutions and legislation that may have contributed to a culture of impunity and lack of respect for human rights and rule of law. In terms of legislation, laws must be reformed in order to ensure the harmonization of international and domestic law. As has been illustrated in Chapter IV, Rwanda has undergone certain legal reforms that bring its national laws in line with international law, in terms of discrimination and in terms of sexual and gender based violence in the context of genocide. It has also been noted, however, that the lack of a definition of rape in the Penal Code has resulted in inconsistent verdicts. It must be emphasized that transitional justice cannot be effective if domestic law does not reflect international human rights standards by providing for clear definitions of crimes of sexual and gender based violence. Neglecting to implement legal reforms directly contributes to the entrenchment of a culture of impunity for perpetrators of all crimes, including those of sexual and gender based violence.

In addition to legislative reform, it is crucial that transitional States also undertake reform of other non-judicial institutions or national bodies in order to eradicate impunity, promote adherence to rule of law, and ultimately pave the road towards reconciliation. In Rwanda, for example, the country's efforts at achieving national reconciliation have included holding democratic elections at the local, regional, and Presidential level; the launching of national poverty reduction strategy, Vision 20/20, that aims to eradicate

²⁴³ Ibid.

poverty by the year 2020; and the establishment of a Human Rights Commission, a Law Reform Commission, and a National Unity and Reconciliation Commission—the latter of which has undertaken extensive campaigns within communities, prisons, refugee camps, and rehabilitation camps in order to sensitize the population as regards the policy of national unity and reconciliation, and to encourage participation in national dialogue. All of these elements are dynamic and crosscutting and rely upon each other to build a cohesive foundation for the reconstruction of Rwandan society. In the end, the effective functioning of all transitional justice mechanisms—particularly as pertains to sexual and gender-based violence—will only be possible once victims feel secure enough to fully participate in the process. As such, it is imperative that the transitional justice process includes the legislative and institutional reform in order to provide post-conflict societies with political, social, and economic security. These reforms, however, must be supplemented by the encouragement of national dialogue in order to break the silence surrounding crimes of sexual and gender-based violence.

V.2.4 National Dialogue and Promotion of Reconciliation

A fourth element of a comprehensive model of transitional justice is encouraging reconciliation through preservation of memory and initiation and promotion of national dialogue, thereby discouraging a conspiracy of silence and eliminating the stigma surrounding sexual and gender based violence. Post-conflict societies must examine and adequately address the effects of sexual and gender based violence in order to ensure that survivors of these crimes do not remain victims, and become active members of society. The fear of societal rejection is powerful, and the inability of women and girls to speak of sexual violence committed against them can render certain transitional justice mechanisms ineffectual. Reconciliation requires openness and dialogue, and as long as crimes of sexual and gender based violence are not outwardly addressed, victims will remain on the outskirts of society, thereby preventing true reconciliation. To this end, the population must be sensitized through outreach programs that encourage adherence to rule of law and respect for human rights, and that redefine sexual violence so that notions

of stigma and shame are removed and a zero-tolerance policy is instituted. As demonstrated by the situation in Rwanda, a key reason why victims of sexual violence are forthcoming with their stories is because they are unaware of their options. Implementing programs that disseminate information and encourage dialogue can perhaps have the most profound impact not only on victims of sexual and gender-based violence, but on society in general in terms of creating an atmosphere that fosters reconciliation. In addition, through such dialogue, States can identify appropriate means through which restitution can be afforded to victims of sexual and gender based violence.

V.2.5 Restitution

Finally, it must be recognized that the economic situation of survivors of mass conflict is drastically affected by conflict, and in most cases women and girls are left behind to take on the role of sole providers. Victims of sexual and gender based violence, in particular, are left to contend with a myriad of physical and psychological illnesses that gravely compromise their ability to survive, let alone to provide for their families. In many post-conflict societies, women are dealing with HIV/AIDS as a result of sexual violence; unwanted pregnancies; poverty; discrimination; and social and economic isolation. The effects of sexual and gender based violence in conflict situations, therefore, are continuous, complex, and multilayered. Given this, the pursuit of justice must include measures that ensure not only that the perpetrators are held accountable for their actions, but that adequate redress is provided for the victims of these gross violations of human rights, and that provide a solid foundation for the rebuilding of fragmented societies. It is in recognition of this, and in the spirit of ensuring justice for these victims that States must institute restitution for victims, including financial compensation and provision of healthcare and education. For example, States should develop and widely implement special programs established for women and girls living with HIV/AIDS as a consequence of sexual violence. These programs should include elements that address both the physical and psychological implications of the HIV/AIDS, and involve outreach elements aimed at the community at large in order to demystify the disease thereby eliminating and preventing stigma. This type of initiative recognizes that justice takes

many forms, other than the traditional form of punishment of the offender. Furthermore, restitution is a crucial element of the transitional justice process, and in societies where resources are limited and monetary compensation is not viable, reparations can be indirectly instituted through the establishment of such programs aimed at the victims of conflict.

At the heart of this comprehensive model of transitional justice is the fact that although the past decade has given rise to groundbreaking achievements in terms of the criminalization of conflict related sexual and gender based violence, transitional societies continue to struggle with identifying the tools necessary to adequately address such crimes. Many of the challenges facing transitional societies stem from the subordinate status thus far accorded to crimes of this nature as enshrined not only in legislation, but in societal and cultural norms as well. As such, judicial and non-judicial transitional justice mechanisms must work in concert to reverse previously enshrined notions of this subordinates status, thereby arming post-conflict societies with the tools to eradicate impunity for crimes of sexual and gender-based violence. In addition to establishing retributive and restorative transitional justice mechanisms, therefore, the pursuit of justice and reconciliation in transitional societies must include reform of archaic laws in order to provide for equal rights for women and girls; reform or establishment of institutions that allow for greater political and social participation of women and girls; and encouragement of national dialogue with particular emphasis placed on education and training for women and girls, particularly education on health and legal matters. Knowing their rights and learning how to exercise them will provide women and girls with the tools necessary for self-empowerment and they will no longer be in a position of total dependence that may leave them economically vulnerable. Furthermore, this will contribute to the eventual eradication of any traditionally enshrined notion of women as subordinates or as objects or as property—an underlying notion that provided some justification for the brutal and widespread sexual violence that took place during and in the aftermath of conflict. Ultimately, the success of any transitional justice process that must contend with crimes of sexual and gender based violence will depend on whether or

not women and girls are provided with an enabling environment that allows them to feel secure enough to actively participate in the process.

V.3 Conclusion

Transitional justice is a fundamental tool with which post-conflict societies can begin to rebuild their seemingly irreparable shattered and deeply fragmented societies. The ultimate aim of transitional justice is not to restore societies to what they once were, but to reformulate various components of State and society in order to effect justice and reconciliation. In the context of sexual and gender-based violence, justice and reconciliation can only be realized if the establishment of transitional justice mechanisms is a comprehensive and engendered process, and reflects struggle to enshrine such crimes as violations of international human rights law comparable in gravity to other war crimes, crimes of genocide, and crimes against humanity. As has been established, the past decade has been crucial in the development of international human rights law as pertains to sexual and gender-based violence. Rape, sexual torture and mutilation, sexual slavery, and forced labour have been woven tightly into the fabric of conflict situations for centuries. The pervasiveness of such acts, however, has not been adequately reflected within the sphere of international law, until relatively recently. The mid 1990s saw crimes of conflict-related sexual and gender-based violence brought to the forefront of international legal developments, with the establishment of the International Criminal for Rwanda and the International Criminal Tribunal for the Former Yugoslavia. Since then, significant advancements have been made by these ad-hoc tribunals, the International Criminal Court, and by internationalized hybrid courts culminating in the criminalization of various forms of sexual and gender-based violence.

However, it is simply not enough to take comfort in the momentous achievements that have occurred over the past decade, however, without explicitly recognizing the challenges and limitations facing transitional justice mechanisms at both the international and national level in terms of implementation. It is evident from the experiences of the transitional justice mechanisms discussed above that there exists a lacuna in the law

between international statutory and jurisprudential developments, and the situation on the ground within post-conflict societies themselves. As such, there remains much to be done within the context of transitional justice to bridge this gap and to ensure that crimes of sexual and gender based violence are not just considered as equally as grave as other crimes of genocide, war crimes, and crimes against humanity only theoretically, but practically as well. In order to realize justice and reconciliation and achieve sustainable social reconstruction, it is imperative for post-conflict societies to take an objective, holistic approach that takes into consideration all of the factors contributing to and arising out of acts of sexual and gender based violence and that makes gender justice a genuine priority.

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